TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925

No. 210

ROBERTS & SCHAEFER COMPANY, PLAINTIFF IN ERROR,

vs.

LOUIS L. EMMERSON, AS SECRETARY OF STATE FOR THE STATE OF ILLINOIS

IN ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS

FILED NOVEMBER 24, 1924

(30,706)

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INDEX

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JULY 1, 1925

[fols. 1-3] [Caption omitted]

[fol. 4] **IN CIRCUIT COURT OF SANGAMON COUNTY**

ROBERTS AND SCHAEFER COMPANY, Complainant,

vs.

LOUIS L. EMMERSON, as Secretary of State for the State of Illinois, Defendant

BILL FOR INJUNCTION—Filed June 12, 1923

To the Honorable Judges of said Court, in chancery sitting:

The Orator, Roberts and Schaefer Company, a corporation organized and existing under the laws of the State of Illinois, having its main office in the City of Chicago, complaining, respectfully shows that it was organized as such corporation under the general laws of the State of Illinois, for profit, prior to the year 1910, with an authorized capital stock of $100,000, consisting of 1,000 shares of the par value of $100, all fully paid up, and that such corporation is now and has long been engaged in the business of engineering and contracting as provided in its charter.

Your Orator further states that on the 7th day of June, 1921, it amended its charter by changing its $100,000 of stock into preferred [fol. 5] stock but without changing the amount or the par value thereof, and also increased its capital stock by the additional issue of 10,000 shares of no par value common stock, which should be "fully paid up and non-assessable upon the payment of $5 for each share, in cash or property, as may be determined by the board of directors."

Said amendments to the charter of complainant and a certificate thereof duly executed according to law were duly filed in the office of the Secretary of State on July 1, 1921, and such amendments have been in full force and effect from July 1, 1921, to the present time and fully set forth that $150,000, consisting of 1,000 shares of preferred stock of the par value of $100 per share and 10,000 shares of no par value common stock, which is fully paid up at $5 per share, constitute all of the capital stock authorized by complainant's charter.

Your Orator further states that between the 1st day of February and the 1st day of March, 1923, it duly executed and filed in the office of the Secretary of State the annual report required by law and in said report set forth that it was willing to be assessed and to pay a franchise tax upon all its authorized capital stock, and also that its total authorized capital stock was $150,000, consisting of preferred stock in the amount of $100,000 and 10,000 shares of no par value common stock, issued and paid up at $5 per share, amounting to $50,000, as appears by said report on file in the office of the Secretary of State.

[fol. 6] Your Orator further states and shows to the court that all its property is in the State of Illinois and all its business is in the

State of Illinois, for the purpose of assessment of franchise taxes as appears by its annual report now on file in the office of the Secretary of State.

Your Orator further shows that on July 1, 1919, there was in full force and effect an act known as the General Corporation Act. That Section 105 of said act was changed by an amendment, effective July 1, 1921, and that said section as amended was in words and figures as follows:

"Each corporation for profit, including railroads, except insurance companies, heretofore or hereafter organized under the laws of this State or admitted to do business in this State, and required by this Act to make an annual report, shall pay an annual license fee or franchise tax to the Secretary of State of five cents on each hundred dollars of the proportion of its capital stock, authorized by its charter in the office of the Secretary of State, represented by business transacted and property located in this State, but in no event shall the amount of such license fee or franchise tax be less than that required by this Act of corporations having no tangible property or business in this State."

Said annual license fee or franchise tax was and is required as a condition of transacting business in the State of Illinois and without the payment of such fees in advance the corporation is not per- [fol. 7] mitted to transact any business nor even to maintain any suit in law or equity, in the State of Illinois. All this appears by Sections 127 and 128 of said General Corporation Law which read as follows:

"127. No corporation shall be deemed to be organized or licensed to transact business in this State, its capital stock increased, its charter amended or renewed, its existence extended, merger or consolidation effected, nor shall it issue any stock, stock certificates, bonds, notes or other evidences of indebtedness upon which fees are required by law to be paid, until such fees are fully paid.

No paper shall be filed in the office of the Secretary of State in and about the incorporation of any company until the initial and other franchise fees provided by this Act are fully paid, when due. No corporation in default in the payment of franchise taxes shall file any papers in the office of the Secretary of State until such franchise taxes and penalties thereon are fully paid.

128. No corporation required to pay a franchise tax or fee under the laws of this State shall transact any business in this State or maintain any action at law or suit in equity, unless such corporation shall have paid such franchise tax, or such fees and penalties when the same become due and payable until such franchise taxes, fees and penalties have been paid in full."

Your Orator further states that other severe penalties are imposed by the statute for failure to pay the annual franchise tax, such as making it a lien upon all the corporation's real and personal property, providing for the seizure and sale of the personal property of

the corporation, and providing for the dissolution of the corporation. [fol. 8] These penalties are set forth in Sections 115, 116 and 118 of said General Corporation Act, which read as follows, viz:

"115. The franchise taxes assessed under this Act, together with penalties, interest and cost that shall accrue thereon, shall be a prior and first lien on the real and personal property of the corporation from and including the first day of July of the year when such franchise taxes should have been paid until the same have been paid. The Secretary of State shall make and keep in his office a record showing the name of each corporation against which a franchise tax has been assessed, the amount assessed against each corporation, together with penalties and costs, if any, and the date when paid, and a notation of any and all proceedings taken for the collection of the franchise tax.

116. In case any corporation shall fail, refuse, or neglect to pay the franchise tax assessed against it on or before the thirty-first day of July, the Secretary of State shall issue a warrant, under his hand and official seal, directed to the sheriff of any county in the State commanding him to collect and return such franchise tax and penalties. It shall be the duty of the sheriff receiving such warrant to levy upon and sell the personal property of such corporation to satisfy such franchise tax and penalties, together with the legal costs and charges of such sheriff. Upon the receipt of such warrant the sheriff shall proceed upon the same in all respects, with like effect, and in the same manner as prescribed by law in respect to executions issued against property upon judgment of courts of record, and shall be entitled to the same fees for the execution of the warrant, to be collected in the same manner. After proceeding in the manner [fol. 9] prescribed, the sheriff shall make the proper and necessary notations, of the amounts collected, upon the warrant and promptly return it to the Secretary of State within ninety days from the date of the issuance thereof, with the amount of franchise tax and penalties collected by him, if any.

118. In case any corporation, required herein to pay a franchise tax, shall fail, neglect or refuse to file its annual report, as required by this Act, or shall fail, neglect or refuse to pay the franchise tax assessed against it on or before the thirty-first day of July of the year in which such franchise tax becomes due and payable, the Attorney General shall file an information in equity against such corporation, either in the circuit court of Sangamon County or in the circuit court of such other county in the State as to the Attorney General may seem best for the dissolution of a domestic corporation for abandonment and nonuser of its charter."

Your Orator further shows that at its present session the legislature amended Section 105 above and said amending act was signed by the Governor and purports to become effective May 3, 1923. Said amendment attempts to add to Section 105 of the following clauses, towit:

"In the event that the corporation has stock of no par value, its shares, for the purpose of fixing such fee, shall be considered to be of the par value of $100 per share.

Sec. 2. Whereas, at the time of the passage of the present 'The [fol. 10] General Corporation Act' of this State conferring upon corporations the privilege of having shares without a par value, it was the intent of the Legislature at that time as a prerequisite to the right of the corporations to enjoy such privilege that in all cases and under all circumstances that such corporations should pay for such privilege the same amount of initial fee and franchise taxes or fees as through such shares were of the par value of one hundred dollars ($100) per share; and

Whereas, it was thought that the Legislature had made this intent perfectly clear in the original Act as passed; and

Whereas, the Supreme Court of this State has held that the Secretary of State cannot regard the shares of no par value for the purpose of assessing the franchise taxes or fees as of the par value of one hundred dollars ($100) per share and require the corporation to pay a franchise tax of five cents (5c) on each share of no par value since the following words were omitted from Section 105 of the aforesaid Act, to-wit:

'In the event that the corporation has stock of no par value, it shares, for the purpose of fixing such fee, shall be considered to be of the par value of $100 per share,' and

Whereas, under the decision of the Supreme Court, the Secretary of State will not be able to collect large sums of money from corporations to which the State is justly entitled, and further that all of the annual franchise tax provisions of the aforesaid Act are in danger of being invalidated unless this omission is remedied; and

[fol. 11] Whereas, the Secretary of State is, under the provisions of Section 112 of the aforesaid Act, obliged to mail notice between the first day of February and the fifteenth day of May, in writing to each corporation against which a franchise tax or fee is assessed, notifying such corporation of the amount of franchise tax or fee assessed against it for the year next ensuing, commencing on July first; and

Whereas, that unless this Act becomes effective on or before May 15th, that the State will lose large sums of money due from corporations and to which the State is justly entitled, therefore, an emergency exists and this Act shall take effect and be in full force from and after its passage.

Sec. 3. An Act entitled 'An Act to amend Section 105 of an Act entitled, "An Act in relation to corporations for pecuniary profit" approved June 28, 1919, and in force July 1, 1919,' approved April 12, 1923, is hereby repealed."

Your Orator further states and shows to the Court that said amendment is void and of no effect because it violates and infringes upon that provision of the Constitution of the State of Illinois which provides in Article IX, Section 1, that:

"The General Assembly shall have power to tax peddlers, auctioneers, brokers, hawkers, merchants, commission merchants, showmen, jugglers, innkeepers, grocery keepers, liquor dealers, toll bridges, ferries, insurance, telegraph and express interests or business, vendors

of patents, and persons or corporations owning or using franchises and privileges, in such manner as it shall from time to time direct by general law, uniform to the class upon which it operates."

and violates that provision of the Fourteenth Amendment to the Constitution of the United States which provides "that no state shall [fol. 12] deny to any person within its jurisdiction the equal protection of the law."

Your Orator further shows to the Court that the annual franchise tax due from your complainant for the year beginning July 1, 1923, is the sum of $200 having regard for the minimum provisions in Sections 105 and 107 of the General Corporation Act, reckoned at the rate of five cents on each $100 of the proportion of the capital stock authorized by your complainant's charter, and represented by business transacted and property located in the State of Illinois.

Your Orator further shows to the Court that Louis L. Emmerson, the Secretary of State of Illinois, has assessed the annual franchise tax, or license fee, upon complainant for the year beginning July 1, 1923, at the sum of $550, claiming that the 10,000 shares of no par value stock should be considered to be of the par value of $100 per share or a total of $1,000,000 for the purpose of assessing such franchise taxes, instead of $50,000, and that the complainant should pay on $1,100,000, instead of $150,000 and has notified Complainant that said sum will become due and payable on the 1st day of July, 1923. Your complainant further shows that to produce $550 in taxes, it is taxed at the rate of 37 cents per $100 of its authorized capital stock instead of 5 cents per $100 of its authorized capital stock.

Your Orator further states and shows to the Court that prior to the filing of this proceeding, it filed its objections to the aforesaid franchise tax in the office of the Secretary of State objecting that said no par value shares had been considered of the par value of $100 for the purpose of fixing said tax and alleging that above amendment [fol. 13] violates the provisions of the United States Constitution and of the Illinois Constitution and claiming that the tax should be reckoned on the total authorized capital stock as it appears by the charter, to wit, $150,000.

Your Orator further shows that Section 105 both before and after the attempted amendment thereto provides as follows:

"but in no event shall the amount of such license fee or franchise tax be less than that required by this Act of corporations having no tangible property or business in this State."

Your Orator further shows that Section 107 of said Act provides as to such corporations that a certain schedule of minimum fees and taxes shall apply and in computing said minimum directs:

"In the event that the corporation has stock of no par value, its shares, for the purpose of fixing such fee, shall be considered to be of the par value of $100 per share."

Your Orator alleges that said part of Section 107 last quoted is void and of no effect because it violates and infringes upon Article

IX, Section 1 of the Constitution of the State of Illinois and the Fourteenth Amendment of the Constitution of the United States to the same extent and in the same manner as the attempted Amendment of May 3, 1923, to Section 105 of the General Corporation Act set forth above. The said constitutional provisions are fully set forth in this petition.

[fol. 14] Your Orator further alleges that except for said void provision contained in said Section 107 and set forth above, and said attempted amendment to Section 105, its franchise tax for the year beginning July 1, 1923, is $75. Your Orator shows that for the purpose of protecting its rights it has tendered the sum of $200 or any part thereof.

Your Orator further states and shows to the Court that said annual franchise tax reckoned on said $150,000 of authorized capital stock amounts to the sum of $200 having regard for the said minimum provision, and complainant tendered and offered to pay to said Secretary of State the sum of $200 or any part thereof, as and for its license fee, or franchise tax, for the year beginning July 1, 1923, but that said Secretary of State, after hearing and considering the objections to the assessment filed by complainant, over-ruled said objections and refused to accept said $200 or any part thereof, or any sum less than $550, as payment of the license fee, or franchise tax, of complainant for said year and demanded that complainant pay to him said sum of $550 as said license fee or franchise tax.

Your Orator alleges that there are many corporations organized under the laws of this State, or authorized to do business in this State, having an authorized capital stock of the exact amount as that of your complainant but which divided the same into par value shares as shown by the certified list of corporations published by authority of the State of Illinois.

Your Orator further shows that these corporations, under said act as amended, pay an annual franchise tax of only $75 for the year beginning July 1, 1923, being at the rate of 5 cents per $100 of their authorized capital stock, while your complainant under said amend-

[fol. 15] ment, if valid, would be required to pay at the rate of 37 cents per $100 of its authorized capital stock.

Your Orator alleges that there are corporations organized under the laws of this state, or authorized to do business in this state, having an authorized capital stock of $150,000, which have divided their authorized capital stock into no par value shares, entirely or partly, on the basis whereby each of such no par value shares represent a part of its authorized capital stock equal to $100. Your Orator shows that the latter corporations will be required to pay an annual franchise tax of only $75 for the year beginning July 1, 1923, being at the rate of 5 cents per $100 of their authorized capital stock.

Your Orator under said amendment if valid will be required to pay at the rate of 37 cents per $100 of its authorized capital stock.

Your Orator further states and shews to the Court that said Secretary of State has threatened and is still threatening that if complainant does not pay said sum of $550 for its franchise tax for the year beginning July 1, 1923, he will promptly, after the 31st day of

July next, issue his warrant to the sheriff of the County of Cook, in which your complainant's principal office is located and where it has personal property available to levy, commanding the sheriff to levy upon such personal property of your complainant and sell the same in satisfaction of said franchise tax unless it is paid by complainant. [fol. 16] Your Orator further states and shows to the court that all of said tax above the sum of $75 is null, void and of no effect, and that complainant has tendered and hereby tenders and offers to pay said Secretary of State, as and for said franchise tax for said year, the sum of $200, or any part thereof, or such other sums as the court may find to be due, as provided by statute.

Your Orator further states that the Secretary of State demanded of all domestic corporations having no-par stock that they pay annual franchise taxes to the State of Illinois for the year beginning July 1, 1923, on their no-par shares of stock on a valuation for said shares of $100 each for the purpose of said assessment, or five cents a share instead of five cents per $100 of their authorized capital stock; that he has made his assessment already on such basis and has sent out notices to such corporations that their franchise taxes so assessed are due and payable by the 1st day of next July and is threatening that if they are not paid on such basis he will issue his warrant to the sheriffs of the various counties where such corporations have their offices and their property, with instructions to such sheriffs to levy on their property and collect the same.

Your Orator further represents that said Secretary of State bases his claim on the fact that the Legislature of the State of Illinois passed the said amendment to Section 105 of the General Corporation Act, which was also approved by the Governor and became effective, if at all, as an emergency act of May 3, 1923. No change was made in the act except as stated above.

[fol. 17] Your Orator further alleges that hundreds of corporations, whose charters have been taken out or amended since July 1, 1919, having no par stock, must before July 31, 1923, pay this void and unconstitutional tax under the penalty of having all of their contracts made after July 1st void and of no effect, their property seized and sold and their corporate existence imperiled.

Your Orator states and shows to the court that the above is a question of great public interest and importance to many corporations whose charters have been issued pursuant to the corporation laws of the State of Illinois and whose charters are now on file with the Secretary of State showing that they have issued no-par shares in large amounts, and your Orator alleges that the franchise taxes assessed on said corporations are void and unconstitutional in so far as they are reckoned and assessed upon a sum in excess of the proportion of their capital stock, authorized by their respective charters, represented by business transacted and property located in the State of Illinois, or assessed at a rate different from five cents per $100 of such proportion of their authorized capital stock.

Your Orator further alleges that it fears and believes that the Secretary of State will carry out his unlawful purpose and levy on the property of your Orator if he is not commanded and directed by

a mandatory writ of injunction from this Honorable Court to accept the sum of $200, or the proper portion thereof, tendered by the complainant as and for its license fee or franchise tax for the year [fol. 18] beginning July 1, 1923, and to issue his receipt to your Orator for the same upon receiving said sum, or unless, in lieu thereof, he be restrained by a writ of injunction from this Honorable Court from issuing a warrant directed to the Sheriff of Cook County commanding him to collect and return such franchise tax.

Forasmuch, therefore, as your Orator is without adequate remedy in the premises except in a court of equity, and to the end that the said Louis L. Emmerson, Secretary of State of the State of Illinois, who is made party defendant to this bill, may be required to make full and direct answer to the same, but not under oath, answer under oath being hereby expressly waived, and to the end that a mandatory injuntcion may be issued out of this Honorable Court against the said defendant commanding him to receive the sum of $200, or the proper portion thereof, as may be found by the Court to be due as and for the complainant's franchise taxes for the year beginning July 1, 1923, or in lieu thereof that a temporary injunction or restraining order prior to the hearing on this bill and after the hearing a permanent injunction be issued enjoining and restraining the said defendant from issuing a warrant directed to the Sheriff of Cook County, or any other county, commanding him to collect and return franchise taxes and penalties in a sum in excess of $200, or the proper portion thereof, and that your Orator may have such other and further relief in the premises as equity may require and to your Honors may seem meet.

[fol. 19] May it please your honors to grant the writ of summons in chancery directed to the Sheriff of said County of Sangamon, commanding him to summons the defendant, Louis L. Emmerson, as Secretary of State for the State of Illinois, to appear before said Court on the first day of the next term thereof, to be held at the Court House in the City of Springfield, Illinois, in the county aforesaid, then and there to answer this bill.

And may it please your honors to grant a temporary restraining order or a writ of injunction restraining the said defendant, Louis L. Emmerson, as Secretary of State, from issuing a warrant directed to the Sheriff of Cook County, or any other county, commanding him to collect and return franchise taxes and penalties in excess of $200, or the proper portion thereof, prior to the hearing on this bill and after the hearing to grant the People's writ of injunction directed to said defendant, Louis L. Emmerson, as Secretary of State of the State of Illinois, commanding him to receive as and for the franchise tax of this complainant for the year beginning July 1, 1923, the sum of $200, or the proper portion thereof found to be due by this Court, and to issue his receipt therefor, or in lieu thereof to grant the People's writ of injunction directed to said defendant, enjoining and restraining the said defendant permanently from issuing a warrant directed to the Sheriff of Cook County, or any other county, commanding him to collect and return franchise taxes and penalties in excess of the sum found by this Honorable Court,

on the hearing of this bill, to be due to the State of Illinois from the complainant as and for its franchise taxes for the year beginning July 1, 1923.

And your Orator will ever pray.

Roberts and Schaefer Company, by Edward E. Barrett, Vice-Pres.

[fol. 20] Sworn to by Edward E. Barrett. Jurat omitted in printing.

[fol. 21] In Circuit Court of Sangamon County

[Title omitted]

Demurrer—Filed June 13, 1923

Now comes Louis L. Emmerson, Secretary of State, defendant in the above enttiled cause, by Edward J. Brundage, Attorney General, and demurs to said bill of complaint, and for cause of demurrer shows that the said complainant has not in and by its said bill made and stated such a case as entitles it to any relief from and against this defendant touching the matters contained in said bill, or any of said matters.

Wherefore, and for other other goods causes of demurrer appearing in the said bill of complaint, this defendant demurs to said bill, and to all the matters and things therein contained, and prays the judgment of this Honorable Court whether he shall be compelled to make any further or other answer to said bill, and he prays to be dismissed hence with his reasonable costs in this behalf sustained.

Edward J. Brundage, Attorney General, Solicitor for said Defendant. Clarence N. Boord, Assistant Attorney General, of Counsel.

[fol. 22] In Circuit Court of Sangamon County

[Title omitted]

Minute Entries—June 22, 1923

This day comes the plaintiff by its attorneys and enters its motion for leave to docket this case at the present term, and the Court being fully advised, allows the said motion and this cause is docketed at the present term.

And the appearance of the above named defendant is this day entered by his solicitor, waiving the issuing and service of process herein and consenting that this cause may be heard at the present term of this Court.

And the said defendant by his solicitor files his demurrer to the bill of complaint.

And by consent of the parties hereto by their respective solicitors a hearing of this case to be had at this time.

And now this cause coming on to be heard upon the demurrer to the bill of complaint and the Court having heard the arguments of counsel thereon and being now fully advised in the premises, sustains the said demurrer.

And the said complainant by its solicitors elects to stand by its bill of complaint.

[fol. 23] And it is thereupon ordered by the Court that complainant's bill of complaint be and the same is hereby dismissed for want of equity.

And it is thereupon ordered by the Court that complainant's bill of complaint be and the same is hereby dismissed for want of equity.

And it is therefore ordered and adjudged by the Court that the said complainant pay the costs of this case and that the said defendant have and recover of and from the said complainant, his costs, by him herein expended and that execution may issue therefor.

And the Court grants and approves a decree dismissing complainant's bill for want of equity and granting appeal to the Supreme Court, which is as follows to-wit:

[fol. 24] In Circuit Court of Sangamon County

[Title omitted]

Decree and Order Allowing Appeal—June 22, 1923

This matter coming now to be heard on bill of compaint and the demurrer thereto, and the Court having heard the argument of counsel and being fully advised,

It is ordered that the said demurrer to the bill of complaint be and the same hereby is sustained.

And the complainant having elected in open court to abide by its said bill of complaint,

It is further ordered, adjudged and decreed that the bill of complaint be and the same hereby is dismissed for want of equity.

To which order and decree the complainant, by its solicitors, excepts and prays an appeal to the Supreme Court of Illinois, which appeal is allowed upon filing of a bond in the sum of two hundred dollars ($200.00) with surety to be approved by the clerk of this court, within twenty days from the date of this decree.

Dated this 22nd day of June, A. D. 1923.

(Signed) E. S. Smith, Judge.

[fols. 25 & 26] Bond on Appeal for $200—Approved and filed July 3, 1923; omitted in printing

[fol. 27] IN CIRCUIT COURT OF SANGAMON COUNTY

[Title omitted]

PRECIPE FOR TRANSCRIPT OF RECORD—Filed July 3, 1923

To Charles L. Koehn, Clerk of the Circuit Court of Sangamon County, Illinois

You will please prepare a complete Transcript of record in the above entitled cause for the purposes of appeal to the Supreme Court of the State of Illinois.

Dated at Springfield, Illinois, this 3rd day of July A. D. 1923.

Johnson, Moran, Paltzer & O'Donnell, Solicitors for Complainant.

Waiver of Notice, etc.

The undersigned, solicitor for the above named defendant, hereby waives the statutory time and notice of filing a Præcipe for Record in the above entitled case.

Edward J. Brundage, by Floyd R. Brittan, Asst. Att'y Gen'l, Solicitor for Defendant.

[fol. 28] IN CIRCUIT COURT OF SANGAMON COUNTY

CLERK'S CERTIFICATE

I, Chas. L. Koehn, Clerk of the Circuit Court within and for the County of Sangamon, in the State of Illinois, and keeper of the records and seal of said Court, do hereby certify that the foregoing is a true, perfect and complete Transcript of the record and proceedings now remaining in my office, also copy of Appeal Bond, in a certain cause lately pending in said Court on the Chancery side thereof, wherein Roberts and Schaefer Company is Complainant and Louis L. Emmerson, as Secretary of State for the State of Illinois, is Defendant, as the same appears from the records and files of said Court in my office remaining.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, at Springfield, this 5th day of July, A. D. 1923.

Chas. L. Koehn, Clerk. (Seal.)

[fol. 29] IN SUPREME COURT OF ILLINOIS

ROBERTS & SCHAEFER COMPANY, a Corporation, Appellant,

vs.

LOUIS L. EMMERSON, as Secretary of State, Appellee

ASSIGNMENT OF ERRORS

Now comes the Roberts & Schaefer Company, appellant, by Johnson, Moran, Paltzer & O'Donnell, its solicitors, and says that in the record and proceedings and in the rendering of the decree by the Judge of the Circuit Court of Sangamon County, in the above entitled cause, there is manifest error prejudicial to their substantial rights in this, to-wit:

1. The Court below erred in sustaining the demurrer to the bill of complaint filed by the appellant.

2. The Court below erred in dismissing the Bill filed by appellant for want of equity.

3. The Court below erred because it refused to decree to appellant the relief or any part thereof prayed by appellant in the bill of complaint filed by appellant in the court below.

4. The Court below erred because it refused to decree the Act of May 3, 1923, amending Section 105 of the General Corporation Act, to be unconstitutional.

[fol. 30] 5. The Court below erred because it refused to decree the last clause of Section 107 of the General Corporation Act to be unconstitutional.

Wherefore this appellant prays that the decree of the Circuit Court of Sangamon County be reversed and that a decree be entered in accordance with the prayer of the Bill of Complaint filed in said court by this appellant, or in lieu thereof that this cause be remanded to the Circuit Court of Sangamon county with directions to enter a decree in accordance with the prayer of the bill of complaint filed in said court by the appellant.

Johnson, Moran, Paltzer & O'Donnell. (Signed) Johnson, Moran, Paltzer & O'Donnell, Solicitors for Appellant.

[fols. 31 &32] IN SUPREME COURT OF ILLINOIS

[Title omitted]

ARGUMENT AND SUBMISSION—Oct. 12, 1923

Now on this day come the parties hereto and this being one of the days set apart for the call of the docket under the rules of this

Court, and it appearing to the Court that —— ——, appellant, hath filed herein a duly certified transcript of the record and proceedings of the Court below, together with printed abstracts thereof, and briefs and arguments of counsel in support of the errors assigned herein, and entered motion to reverse the judgment and remand said cause and for costs, and the said appellee, —— ——, having entered motion to affirm said judgment and for costs and procedendo, and said motions being taken under advisement for final hearing, and the Clerk of this Court reporting that said cause is now ready to be taken, and said cause having been argued orally by Paul O'Donnell and H. C. O'Brien for appellant and by Clarence N. Boord, Assistant Attorney General, for appellee, is here submitted for the consideration and judgment of the Court:

Therefore it is ordered by the Court that this cause be and the same is hereby taken under advisement.

[fol. 33] IN SUPREME COURT OF ILLINOIS

[Title omitted]

OPINION—Filed Feb. 19, 1924

THOMPSON, J.:

Appellant, Roberts & Schaefer Company, a domestic corporation, filed its bill in the circuit court of Sangamon County against Louis L. Emmerson, as Secretary of State, alleging that the total amount of its authorized capital stock is $150,000; that it is divided into 1,000 shares of preferred stock of the par value of $100 a share, and 10,000 shares of common stock of no par value issued as fully paid at $5 a share; that under the provisions of section 105 of the General Corporation act its annual franchise tax should be $75; that the amendment to the section added in 1923, which fixes the value of all stock of no par value at $100 a share, is in contravention of section 1 of article 9 of the constitution of 1870; that the secretary of State has refused to accept $75 tendered to him by appellant, and demands $550 as the annual franchise tax due from appellant, and threatens to enforce his demands by inflicting the statutory penalty. Appellant prays that the court grant a mandatory injunction against appellee to accept $75 in full for the annual franchise tax due from appellant for the year beginning July 1, 1923, and for other relief. The court held the amendment constitutional and that the tax demanded by the secretary of state was due from appellant and dismissed its bill for want of equity. This appeal followed.

Section 105 provides: "Each corporation for profit, including railroads, except insurance companies, heretofore or hereafter organized under the laws of this State or admitted to do business in [fol. 34] this State, and required by this act to make an annual report, shall pay an annual license fee or franchise tax to the Secretary of State of five cents on each one hundred dollars of the proportion of its capital stock, authorized by its charter in the office of the Secretary of State, represented by business transacted and property

located in this State, but in no event shall the amount of such license fee or franchise tax be less than that required by this act of corporations having no tangible property or business in this State. In the event that the corporation has stock of no par value, its shares for the purpose of fixing such fee shall be considered to be of the par value of $100 per share."

All of the property of appellant is located and all of its business is transacted in this State. According to its charter, the total amount of its authorized capital stock is $150,000. Appellee contends that the "amount of authorized capital stock," in so far as it is represented by shares of no par value, is not required to be stated in dollars, and that there is a compliance with item 8 of paragraph 4 when the number of such shares is stated. Using this as a premise, he argues that it therefore becomes necessary for the legislature to establish an arbitrary value for such shares for the purpose of fixing a basis for collecting fees. Considering, as we must, all the provisions of the General Corporation act, it is clear that the contention that the amount need not be stated in dollars is without merit.

The statement of incorporation must set forth: "8" The total amount of authorized capital stock"; "(6) The number of shares into which the capital stock is to be divided, whether all or part of the [fol. 35] same shall have a par value, and if so, the par value thereof, which shall not be less than five dollars, nor more than one hundred dollars, per share, and whether all or part of the same shall have no par value"; (9) The amount of such stock which it is proposed to issue at once (which shall not be less than one thousand dollars, all of which must be subscribed"; and (10) The payment of at least one-half of the capital stock, which it is proposed to issue at once." The term "capital stock," properly speaking, signifies the amount fixed by the corporate charter to be subscribed and paid in by the shareholders of a corporation. It is the property of the corporation contributed by its shareholders to the extent required by its charter. While the capital or assets of a corporation may be increased by accumulation of profits or enhancement in the value of property or reduced by losses or decrease in values, the amount of the capital stock remains fixed unless it is increased or reduced by or under legislative authority. (Armstrong v. Emmerson, 300 Ill. 54.) "The amount of authorized capital stock means the total sum of money necessary to be paid into the treasury of the corporation to secure the issuance of the total number of shares of stock authorized by the articles of incorporation" (People v. Emmerson, 305 Ill. 348.) The capital stock is divided into a certain number of shares, each share being the interest which the owner or stockholder has in the management of the corporation and in its surplus profits, and, on a dissolution, in all its assets remaining after the payment of its debts. The corporation issues to each stockholder a stock certificate, which is a written acknowledgment of the interest of the stockholder in the corporate property. This certificate of stock is not the stock itself. [fol. 36] It is mere evidence of the holders' ownership of the stock and of his rights as a stockholder to the extent specified therein.

(5 Fletcher's Cyc. Corp. sec. 3425). If the stock has a stated par value, that par value must be expressed in the certificate; but if the stock is of that variety known as stock having no par value, then the dollar mark does not appear on the certificates. In either event, the stock has in fact a par value, i. e. a value equal to the fractional part of the authorized whole represented by it. In the one variety it is expressed on the certificate; in the other it is not. Whatever the character of the certificate issued, each share represents an aliquot part of the total assets of the corporation, regardless of what its nominal or its actual value may be. Rarely, if ever, is the actual value of a share of stock the same as its nominal value. Practical experience shows that it is impossible to maintain a constant equilibrium between the nominal capital of a corporation and its assets. The par value of a share of stock, whatever the character of the certificate issued to the shareholder, is the fractional part of the share capital, represented by a particular variety of stock, produced by dividing the total amount authorized by the number of shares into which such variety is divided. For example, the par value of the no par value stock of appellant is 1/10,000 of $50,000, or $5. That the amount of the authorized capital stock must be stated in dollars is evidenced by the fact that the legislature has said that the amount which is proposed to be issued at once shall not be less than $1,000. It does not say the minimum may be 200 shares of no par value stock. How is the secretary of State to know when one-half of the amount [fol. 37] of capital stock, which it is proposed to issue at once, has been paid, if the amount is not stated in dollars? Section 23 makes directors liable for assenting to an indebtedness in excess of the amount of capital stock of the corporation and for declaring a dividend which will impair the capital stock. Section 28 requires at least one-half of the amount of an increase in capital stock to be paid in before the new stock is issued, and section 53 makes each stockholder liable to creditors to the extent of any unpaid portion of the shares issued to him. These sections are a nullity unless the amount of the capital stock of a corporation must be stated in dollars. Whether the stock have a stated par value or have no par value stated, the corporation cannot issue the stock for less than par. In order to secure the issue of all the shares of stock there must be paid into the treasury of the corporation, in cash or its equivalent, the total amount of its authorized capital stock. Under section 32, the corporation is authorized to sell its shares of stock having no par value for such consideration, not less than $5 nor more than $100 per share, as may be prescribed in the certificate of incorporation, or as from time to time may be fixed by the board of directors, pursuant to authority conferred in its certificate, but the price fixed could under no circumstances be less than par. If the total amount of authorized capital stock of a corporation be $10,000 divided into 1,000 shares of no par value, the minimum price for each share must be $10. Section 30 requires each certificate for shares of capital stock to have stamped or printed on it the amount actually received by the corporation for the shares represented by it.

Section 1 of article 9 of the constitution gives the General Assembly power to tax corporations, owning or using franchises and privileges, in such manner as it shall from time to time [fol. 38] direct by general law, uniform as to the class upon which it operates. The legislature may classify corporations for taxation. (Coal Run Coal Co. v. Finlen, 124 Ill., 666,) but the classification must have some reasonable relation to the end proposed by the particular legislation. (Springfield Gas Co. v. City of Springfield, 292 Ill. 236; Commonwealth v. Alden Coal Co. 251 Pa. 134, 96 Atl. 246; State v. Minnesota Farmers' Mut. Ins. Co. (Minn.) 176 N. W. 756; Hayes v. Smith, (Mont) 192 Pac. 615.) Corporations may be classified as banking, railroad, mining, insurance and manufacturing, because each of these classes has characteristics which differentiate it in important particulars from the others. But there is no reasonable basis for placing corporations issuing their stock with a par value in a class different from those corporations issuing no par value stock. Take, for instance, two companies manufacturing the same article by the same process, and each of which has an authorized capital stock of $100,000 divided into 20,000 shares. What possible difference can it make if one of these corporations issues certificates stating a par value of $5 while the other issues certificates which state no par value? The actual par value of the shares in both corporations is exactly the same, and so also is the liability of the directors and the stockholders to creditors, and the rights of the shareholders to participate in the business of the corporation. But under the amendment added in 1923 to section 105 the corporation issuing certificates expressing no par value must pay an annual franchise tax twenty times as large as the corporation issuing certificates expressing a par value. This is a discrimination which finds no basis in authority or in reason. Whether [fol. 39] stock be par value or no par value, it merely represents the proportionate interest of the holder in the corporate assets, (8 Thompson on Corp. 2nd ed. sec. 3447a,) and the burdens of taxation must fall equally upon all corporations of a given character without regard to whether their stock is of the one kind or the other. The amendment is unconstitutional and void. People v. Mensching, 187 N. Y. 8, 79 N. E. 884.

The decree is reversed and the cause is remanded with directions to enter a decree in accordance with the prayer of the bill.

Reversed and demanded with directions.

[fols. 40-42] IN SUPREME COURT OF ILLINOIS

[Title omitted]

JUDGMENT—Feb. 19, 1924

And now, on this day, this cause having been argued by counsel, and the Court having diligently examined and inspected as well the

record and proceedings aforesaid, as the matters and things therein assigned for error, and now, being sufficiently advised of and concerning the premises, are of the opinion that in the record and proceedings aforesaid, and in the rendition of the Decree aforesaid, there is manifest error: Therefore it is considered by the Court that for that error and others in the record and proceedings aforesaid the Decree of the Circuit Court of Sangamon County in this behalf rendered, be reversed, annulled, set aside and wholly for nothing esteemed, and this cause be remanded to the Circuit Court of Sangamon County with directions to enter a decree in accordance with the prayer of the bill.

And it is further considered by the Court that the said Appellant recover of and from the said Appellee its costs by it in this behalf expended to be taxed, in due course of law.

[fol. 42-1] IN SUPREME COURT OF ILLINOIS

[Title omitted]

PETITION FOR REHEARING—Filed March 15, 1924

And now comes Louis L. Emmerson, as Secretary of State for the State of Illinois, appellee herein, and hereby makes application for a rehearing of the above entitled cause, and in support thereof shows that in rendering its decision and opinion herein the Court has over-[fol. 42-2] looked or misapprehended certain material points and authorities applicable to said cause, as follows:

I

The Court in its opinion states that the bill of complaint in said cause alleged that the total amount of the authorized capital stock of appellant was $150,000; whereas, the said bill of complaint in fact alleged that appellant was originally organized with an authorized capital stock of $100,000, consisting of 1,000 shares of the par value of $100 each; that on June 7, 1921, it amended its charter by changing the original $100,000 par value stock into preferred stock of the same par value, and that it also increased its capital stock by the addition of 10,000 shares of common stock of no par value, and further alleged that its charter provided that said additional stock should be fully paid up and non-assessable upon the payment of $5 for each share of such stock in cash or property (Abst. p. 2).

The Court has assumed that the provisions of the Corporation Act referred to in its opinion require that the authorized capital stock of a corporation shall be fixed and specified in its charter in a certain definite amount of money, regardless of the fact that the charter of such corporation may provide that a part or all of its stock shall be stock of no par value.

The Court apparently has overlooked the fact that under paragraph [fol. 42-3] 4 of said Act a statement of incorporation must set forth only the following facts with reference to the capital stock of such corporation:

"(6) The number of shares into which the capital stock is to be divided, whether all or part of the same shall have a par value, and if so, the par value thereof shall not be less than five dollars, nor more than one hundred dollars per share, and whether all or part of the same shall have no par value, etc;

(8) The total amount of authorized capital stock;

(9) The amount of such stock which it is proposed to issue at once (which shall not be less than one thousand dollars, all of which must be subscribed for);

(10) The payment of at least one-half of the capital stock, which it is proposed to issue at once, with a description of the nature and value of the property, if any, paid for such capital stock."

Although said clause (6) of paragraph 4 does not require the par value or any value to be stated with reference to capital stock having no par value, the decision of the Court herein would in effect require the par value of such stock to be stated and would thereby extend the provisions of said clause beyond the purpose and intent of the legislature.

The Court has apparently assumed that the provision of clause (8) of said paragraph 4 that "the total amount of authorized capital stock shall be stated," requires that such statement shall show the total sum of money which must be subscribed and paid for all such stock, regardless of the fact that all or part of such stock may [fol. 42-4] be stock of no par value, and that the price at which such stock may be issued and sold is not required to be fixed and specified in the charter of a corporation, but may be afterwards fixed by the board of directors of such corporation, pursuant to authority conferred in its certificate of incorporation, under Section 32 of said Act.

The Court in its opinion apparently has construed the authorized capital stock of a corporation to be in effect the same as the capital of such corporation; whereas, the capital of a corporation is considered to be only the aggregate amount paid in on its shares of capital stock issued and outstanding, and does not include any authorized capital stock which may not be issued, as provided by clause (3) of paragraph 23 of said Act.

The Court in its opinion assumes that the only difference between par value stock and stock of no par value is that the former kind of stock must have the par value stated in the certificate, while such value is not required to be stated in the certificate for the latter kind of stock, but that in either event such stock has in fact a par value, which is equal to a fractional part of the authorized capital stock, which construction would nullify the substantial differences between such kinds of stock, contrary to the intention of the Legislature.

The opinion further states that the par value of a share of stock of either kind "is the fractional part of the capital share,—produced by dividing the total amount authorized by the number of [fol. 42-5] shares;" which view fails to distinguish the essential difference between capital and authorized capital stock, and disregards the fact that a part of the authorized capital stock may not be issued and outstanding.

The provision of said clause (9) of paragraph 4 that the amount of stock which it is proposed to issue at once shall not be less than one thousand dollars, all of which must be subscribed for, requires only that such minimum amount in money must be subscribed and paid for the amount of stock to be issued at once, and does not in any sense require a par value to be specified and fixed for stock of no par value, particularly with respect to any such stock which may not be issued at once, but which may be held and issued later for such amount as may be fixed by the board of directors of any such corporation.

The provisions of clause (10) of said paragraph 4 require only the fixing of the price of stock to be issued at once, and that one-half of such amount shall be paid, but does not require the price to be fixed for stock which is not to be issued at once, and has no reference to the nominal value of any stock of no par value which may be provided for such corporation.

The Court in its opinion assumes that the price at which the capital stock of a corporation may be issued and sold is necessarily the par value of such stock, although the statute may not require [fol. 42-6] the par value to be stated; whereas, stock of no par value may be authorized by the charter of a corporation at the nominal amount of five dollars per share, but may in fact afterwards be issued and sold at any price from that amount up to one hundred dollars per share.

Under the opinion of the Court in this case, a corporation may be organized with a certain number of shares of capital stock of no par value, but which are valued for the purpose of incorporation at the nominal sum of five dollars per share, but which the board of directors may afterwards order to be issued and sold at any price up to one hundred dollars per share; and thereby such corporation could be required to pay an annual franchise tax at the rate of only five dollars per share, although such stock might be issued and sold at a price of one hundred dollars per share.

Under the decision of the Court in this case, the appellant can and probably will, if its business conti-ues to be prosperous in the future, retire or refund its preferred stock in the sum of $100,000 and it will then have outstanding only said 10,000 shares of common stock of no par value, which will be the sole capital stock on which it can then be taxed, in lieu of said original capital stock of $100,000, although such common stock may and probably will be of much greater actual value than said original stock, and in that case the dividends paid thereon will largely exceed the dividends previously [fol. 42-7] paid upon either the original or preferred stock of appellant.

The Court apparently has not considered that by such methods as have been adopted by appellant, any corporation in this State will be able under the decision herein to convert part or all of its par value capital stock into stock with no par value, which may be issued for the nominal sum of $5 per share, and thereby can avoid the payment of an annual franchise tax except for the nominal amount for which such stock is issued, although it may have an actual value equal to or greater than the par value stock for which it is substituted and on which the State has heretofore been able to assess and collect a substantial franchise tax annually.

II

In assuming that there is no basis for classification, herein, the Court has overlooked the fact that capital stock with no par value may be and frequently is issued and paid for by the transfer to the corporation of patent rights, secret processes, good will and other intangible rights and interests, which are not susceptible or capable of being accurately appraised in money value, but may in fact be afterwards found to be of much greater value than the nominal amount for which such stock was issued, and that in such case the corporation actually receives a consideration far in excess of the issue price of such stock and earns and pays dividends upon [fol. 42-8] the actual value thereof.

The Court evidently has not considered that under the decision of this Court in People v. Emmerson, 302 Ill., 300, capital stock of no par value may be issued and sold for the nominal sum of $5 per share, and that the purchaser of 20 shares of such stock for the sum of $100 would have 20 times the voting power of a stock holder who had paid the same amount for a share of preferred stock of the par value of $100; and that by reason thereof, the promoters of a corporation are enabled to and frequently do organize and control such corporation by the investment of but little more than one-twentieth of the amount required to pay for the capital stock of such corporation, by causing a sufficient amount of the non-par stock to be issued to themselves at $5 per share, while the par value or preferred stock may be issued and sold to other investors at $100 per share, and if the business of the corporation is successful, such preferred stock may be retired or refunded, and thereby the holders of the non-par stock may become the owners of the entire stock of the corporation.

The Court has overlooked the fact that by the means aforesaid, capital stock of no par value may be issued for the nominal sum of $5 per share, and may be acquired by the exchange of intangible rights and interests of uncertain or indefinite cash value and that while the preferred stock of such corporation which has been [fol. 42-9] issued for $100 per share may be limited to an annual dividend of $6 or $7 per share, unlimited dividends may be paid upon the no par value stock of such corporation for which only $5 per share or some intangible rights were given, and that in some cases in this state dividends amounting to $10 or $12 per share

have in fact been paid annually on such stock, and by reason thereof, it has an actual cash value far above the sum of $100 per share.

The Court has apparently overlooked the fact that by reason of the flexibility and uses which may be made of stock with no par value, and also, that such stock might be issued for any amount from $5 up to $100 per share, and that it may actually have a value of $100 or more per share, although issued for a much smaller nominal amount, the Legislature had the right to assume for the purposes of fixing the franchise tax on such stock that it had or might have a value of $100 per share for corporation purposes, and that it therefore should be put in the same class and taxed at the same rate as stock of the par value of $100 per share.

The Court apparently has overlooked some of the distinguishing features of no par value stock which would justify the valuation of such stock at one hundred dollars per share for the purpose of assessing the annual franchise tax, which may be summarized as follows:

[fol. 42-10] First. Such stock is often issued for intangibles of doubtful value, such as patent rights, good will, secret processes, etc.

Second. Such shares of stock may have twenty times as great voting power for the amount invested as stock of a par value in the same corporation.

Third. The use of shares of no par value stock is a means of retaining control of a corporation.

Fourth. Shares of no par value are the speculative stock and therefore, if the undertaking succeeds, they become the most valuable stock of the corporation.

Fifth. Stock of no par value usually represents the equity in the property of the corporation.

Sixth. If the corporate enterprise succeeds there is no limit as to how valuable shares of no par value may become. Such shares may actually be worth many times the amount of the par value shares of the corporation.

Seventh. Corporations having stock of no par value have authority in all reports and advertising matter to set forth the fact that their authorized capital stock consists of so many shares without par value, without reference to the dollar sign.

Eighth. Since such shares of no par value are usually issued for intangibles of which no man, however wise, can determine the exact value, the State in fixing the franchise fee merely presumes that they are issued for the maximum amount, and there is certainly no violence done to the corporations in such cases as they are not obliged [fol. 42-11] to avail themselves of the privilege of having shares of no par value.

Appellee submits that classification for the purpose of franchise taxes, cannot be reasonably said to depend alone upon the line of

business in which a corporation is engaged, whether it be banking, railroad, mining, insurance or manufacturing, but the privileges extended to no par shares are greater and distinct from the par shares, and this is a good reason for the flat charge of five cents per share fixed by the Legislature; in fact, the Secretary of State would be utterly helpless to administer the law as respects no par shares, except upon a flat charge per share.

No injustice can possibly arise by reason of the Amendment of 1923, for the reason that a new corporation, unless it so chooses, will not adopt the no par stock at all, and existing corporations under the statute can easily amend their charters and change to stock of par value at will and relieve themselves from any franchise tax that they do not choose to pay.

The special privilege of doing business as a corporation comes from the State on the terms prescribed by the General Assembly. The State has and should have the right to fix the terms, conditions and fees to be paid by the corporation, and that too without any reference whatever to the valuation of the property that the stock is to represent [fols. 42-12-44] on a flat charge per share, and in the case of no par shares, it is utterly impossible to handle it on any other basis, for the Secretary of State is without means of knowing at all times and from time to time the value of the no par shares of stock of a corporation.

If the decision herein shall be allowed to stand as a law, the State of Illinois will probably lose annually at least one million dollars and may be compelled to refund several million dollars collected by the Secretary of State in the past.

For the foregoing reasons, appellee respectfully asks for a rehearing of this cause and that upon further consideration the decree of the Circuit Court herein be affirmed by this Court.

Respectfully submitted, Edward J. Brundage, Attorney General, Solicitor for Appellee. Clarence N. Boord, Assistant Attorney General, of Counsel.

[fol 44-1] IN SUPREME COURT OF ILLINOIS

[Title omitted]

AMENDED PETITION FOR REHEARING—Filed April 1, 1924

And now comes Louis L. Emmerson, as Secretary of State for the State of Illinois, appellee herein, and hereby makes application for a rehearing of the above entitled cause, and in support thereof shows [fol. 44-2] that in rendering its decision and opinion herein the Court has overlooked or misapprehended certain material points and authorities applicable to said cause, as follows:

I

The Court in its opinion states that the bill of complaint in said cause alleged that the total amount of the authorized capital stock of

appellant was $150,000; whereas, the said bill of complaint in fact alleged that appellant was originally organized with an authorized capital stock of $100,000, consisting of 1000 shares of the par value of $100 each; that on June 7, 1921, it amended its charter by changing the original $100,000 par value stock into preferred stock of the same par value, and that it also increased its capital stock by the addition of 10,000 shares of common stock of no par value, and further alleged that its charter provided that said additional stock should be fully paid up and non-assessable upon the payment of $5 for each share of such stock in cash or property (Abst. p. 2). It is a mistake to say that the charter of appellant provides for an authorized capital stock of $150,000.

The Court has concluded that the provisions of the Corporation Act referred to in its opinion require that the authorized capital stock of a corporation shall be fixed and specified in its charter in a certain definite amount of money, regardless of the fact that the charter of [fol. 44-3] such corporation may provide that a part or all of its stock shall be stock of no par value.

Referring to the contention of the appellee that the "amount of authorized capital stock" in so far as it is represented by shares of no par value, is not required to be stated in dollars, and that there is a compliance with item (8) of Section 4 of the General Corporation Act, when the number of such shares is stated, the opinion states:

"Considering, as we must, all of the provisions of the General Corporation Act, it is clear that the contention that the amount need not be stated in dollars is without merit."

We respectfully submit that this conclusion and statement is not based upon a proper consideration of all of the provisions of the General Corporation Act, but that it clearly ignores certain provisions and does not give effect to the clear intent of the Legislature.

We believe that the Legislature intended to provide that corporations organized in this State may have stock of no par value, and did not intend to provide that they might have no par stock having a par value, which is a plain contradiction of terms. The effect of the opinion is that corporations of this State may not have stock of no par value but that all such stock has a par value fixed by the charter, exactly the same in effect as if it were par value stock, al- [fol. 44-4] though the Legislature has provided most explicitly that such corporations may have stock of no par value.

We believe the opinion misapprehends and fails to carry out the intention of the Legislature as shown by a consideration of all the provisions of the Act.

Section 4 of the General Corporation Act provides that the statement of incorportion filed by the corporators set forth, among other things, the following:

"(6) The number of shares into which the capital stock is to be divided, whether all or part of the same shall have a par value, and if so, the par value thereof shall not be less than five dollars, nor more than one hundred dollars per share, and whether all or part of the same shall have no par value, etc.;

"(8) The total amount of authorized capital stock;

"(9) The amount of such stock which it is proposed to issue at once (which shall not be less than one thousand dollars, all of which must be subscribed);

"(10) The payment of at least one-half of the capital stock, which it is proposed to issue at once, with a description of the nature and value of the property, if any, paid for such capital stock."

It is to be noted that item (6) above quoted provides in effect that the number of shares of the capital stock shall be stated, the number of shares having a par value, the number of shares having no par value, and the par value of the shares having a par value; but the par value of the shares having no par value are not required to be stated. [fol. 44-5] If it was intended to require the par value of the shares of no par value to be stated or fixed by the charter, is it not reasonable to think that it would have so provided, not leaving it to be determined by mathematical calculation?

It is true that item (8) of the same section does require that the statement of incorporation shall set forth

"(8) That total amount of authorized capital stock;"

but taken in connection with item (6) and with subsequent provisions of the Act this item does not intend to require that the total amount in dollars of the capital stock shall be set forth, but the amount in dollars of the shares of par stock and the number of shares of no par stock, the same being a statement or summary of the statement contained in item (6).

We believe that the Court has misapprehended the meaning and intent of the second paragraph of Section 32, which provides in part that

"The corporation may issue and sell its shares of stock having no par value from time to time for such consideration, not less than five nor more than one hundred dollars per share, as may be prescribed in the certificate of incorporation, or as from time to time may be fixed by the board of directors, pursuant to authority conferred in such certificate."

This provision is absolutely useless if the par value of the no par stock is to be fixed in the statement required by Section 4 and which becomes a part of the charter. If the par value must be fixed as the [fol. 44-6] consideration at which no par stock shall be issued, why provide that it may be issued for such consideration, "as may from time to time be fixed by the board of directors?"

The opinion refers to and in effect sets forth said portion of Section 32, and adds "but the price fixed could under no circumstances be less than par." We are unable to understand the meaning and application of the words quoted. It seems to us clear that Section 32 intends to and does authorize the board of directors to issue the number of shares of no par stock provided in the charter for such consideration not less than five nor more than one hundred dollars per

share, "as from time to time may be fixed by the board of directors," and that this clearly shows that it was not thought to be necessary for the charter either directly or indirectly to fix the amount in dollars of the no par stock.

Referring to the statement of the Court relative to the provisions of section 32 of the act, and the further statement, "But the price fixed could under no circumstances be less than par," it would seem that the Court may have thought that under said section the board of directors could fix a par value in the charter, and that they might sell and issue the stock at a higher price or consideration, but not at a lower price. If this be the meaning of the Court, a corporation may be organized with a certain number of shares of capital stock of no par value, but which are valued for the purpose of incorporation at [fol. 44-7] the nominal sum of five dollars per share, but which the board of directors may afterwards order to be issued and sold at any price up to one hundred dollars per share; and thereby such corporation could be required to pay an annual franchise tax at the rate of only five dollars per share, although such stock might be issued and sold at a price of one hundred dollars per share. If this be true, then the only effect of naming the consideration in the charter now would be to secure the payment of the minimum franchise tax on such stock. It seems clear that the legislature did not intend that this should be the meaning of the said provisions of section 32.

That the legislature did not intend to fix by the charter any par value for no par stock is conclusively shown by the fact that in the sections of the act which provide for the franchise fees or taxes, both the initial and annual fees, whether on domestic or foreign corporations, expressly provide that for the purpose of computing such fees, shares of no par stock "shall be considered to be of the par value of one hundred dollars per share."

If it was intended that the charter should fix the par value of no par shares, can it be conceived that the legislature would fix another and different par value for such no par shares in the sections dealing with franchise fees and taxes? Is it not clear that the reason for fixing an arbitrary sum, as the par value of such shares for com- [fol. 44-8] putation of the franchise fees, is that the charter does not of necessity fix any par value for such shares?

Sections 96 and 101, which deal with the initial franchise fees or taxes on domestic and foreign corporations, respectively, and sections 105 and 107, which provide for annual franchise fees or taxes, all contain provisions substantially that if the corporation has shares of no par value, for the purpose of computing the amount of such fees or taxes, such shares of no par value shall be considered as having a par value of one hundred dollars per share.

The Court has overlooked this plain evidence that the legislature recognized that no par stock under the statute has no par value, and that in order to determine the amount of the authorized capital stock it was necessary to fix an arbitrary par value for the purpose of computing the franchise taxes and fees provided for in the act.

The Court in its opinion says:

"That the amount of the authorized capital stock must be stated in dollars is evidenced by the fact that the legislature has said that the amount which is proposed to be issued at once shall not be less than $1,000. It does not say this minimum may be 200 shares of no par value stock. How is the Secretary of State to know when one-half of the capital stock, which it is proposed to issue at once, has been paid, if the amount is not stated in dollars?"

In reply to this we would say that there does not seem to us to be [fol. 44-9] the slightest difficulty in complying with items (9) and (10) of Section 4. The charter must state the amount in dollars of the par stock which is intended to be issued at once, and the number of shares and the consideration of the shares of no par stock which is intended to be issued at once. The amount of such stock, whether par or non-par, or both, must be at least $1,000 and, one-half of such stock intended to be issued at once must be paid in, whether it be par or non-par. If only non-par stock is proposed to be issued at once, then 200 shares at a consideration of $5 per share would be the minimum. But if the consideration fixed is $10 per share then 100 shares would be the minimum. One-half of the non-par stock at the consideration fixed in the charter for stock to be issued at once would be required to be paid in. But our contention is that except in case of a corporation having non-par stock to be issued at once it is not necessary to fix any price or consideration for non-par stock in the charter, and such price or consideration may never be fixed, as it may never be desired to issue it, just as in case of par stock which may never be issued. But in either case the entire amount of dollars of the authorized capital stock must be taken into consideration and used in fixing the annual franchise fee or tax.

II

We have attempted to show that the true meaning and intent of Section 4 of the General Corporation Act does not require that a par [fol. 44-10] value be fixed or determined in the charter, for no par value stock of a domestic corporation; that it is not necessary to state or fix the amount in dollars of the no par value stock in the charter of a domestic corporation; that it was the intent of the legislature that the board of directors might fix the price or consideration at which the no par stock provided for in the charter shall be issued from time to time; and that as to foreign corporations it is absolutely impossible to determine the amount in dollars from the charters or certificates of incorporation of the foreign corporations applying for admission or which have been heretofore admitted to do business in.

We have shown, we think, the necessity for provisions fixing the par value of non-par stock for the purpose of assessing the franchise fees and taxes uniformly against domestic and foreign corporations, and also the intent of the legislature to meet that necessity by placing provisions fixing such par value for such purpose in all of the sections of the act providing for computation of such fees and taxes.

The question remains whether in view of such necessity and the evident interest of the legislature to meet it, the said provisions fixing such par value for no par stock for said purpose are unconstitutional and void.

The court in its opinion herein finds that it is necessary that the [fol. 44-11] par value of no par value shall be stated in the charter of a domestic corporation, and by implication seems to find that there is no necessity for fixing a par value on no par value stock, because a par value is already fixed in the charter. The Court evidently gave no consideration to foreign corporations over whose charters the legislatures and officers of this State have no control. Having eliminated the necessity the Court says:

"The legislature may classify corporations for taxation * * * but the classification must have some reasonable basis to the end proposed by the particular legislature. * * * Corporations may be classified as banking, railroad, mining, insurance and manufacturing, because each of these classes has characteristics which differentiates it in important particulars from the others. But there is no reasonable basis for placing corporations issuing their stock with a par value in a class different from those corporations issuing no par value stock."

We believe the Court has not fully apprehended and considered the reasons for the placing of the provisions in question in the sections dealing with franchise fees and taxes, viz.: the provisions fixing a par value of $100 per share on stock of no par value; or, in other words, the reasons for making a class for corporations having no par stock. As heretofore pointed out, we believe the Court was mistaken in finding there is no necessity for such provisions. If the necessity exists in order to fairly and uniformly tax all corporations, then that reason alone is sufficient to justify such provisions, and there is clearly such necessity. (See American Uniform Co. v. Commonwealth, 237 Mass., 42, cited and quoted from on pages 22 and 23, [fol. 44-12] brief and argument for appellee.)

In that case the only reason stated for fixing a par value of $100 per share for no par value stock was the necessity for fixing some reasonable standard for measuring the tax on corporations having stock of no par value. The Court said:

"At any rate it was its (the legislature's) duty to adopt some measure for the excise to be charged against such corporation, reasonably fair to them compared to the excise levied on other foreign corporations." (Appellee's brief, p. 23.)

But we think it clear that there are other distinctions and differences between corporations having par stock and those having no par stock. If there were not some such distinctions and differences, why should there be laws in nearly all the states providing for corporations having no par stock? If there is no difference, we submit there is no reason whatever for their existence, and the very fact that nearly all the states now provide for corporations having no par stock shows that there must be some differences and distinctions between them and corporations having only stock of par value.

But while it is clear that there are such differences and distinctions, yet it is not easy to state them clearly. But the purpose and effect of such stock is well understood. Corporations having no par stock usually have preferred stock of par value, and the no par stock as a rule controls the corporation. It is usually issued and paid up for [fol. 44-13] much smaller consideration per share than the par stock, and it has a much greater voting power in comparison to the consideration paid. For instance, no par stock issued for a consideration of $5 per share has the same voting power (in this State, at least) as par stock issued for a consideration of $100 per share. It is well understood that corporations are organized with no par stock in order that the promoters and incorporators with only a small investment may control the corporation.

If a corporation having preferred stock and no par stock succeeds and becomes prosperous, the holders of the no par stock secure great profits upon the small investment made by them. No par stock is in many, many cases issued for patents, good will, promoters' services, etc.

There is good authority to the effect that the holders of no par stock do not have the same measure of liability in comparison with their interest in the corporation that stockholders of corporations having par stock have.

In an article published in the American Bar Association Journal for October, 1921, Mr. William W. Cook, the eminent authority on corporation law, condemns corporations issuing no par stock in strong terms. In the opening sentence of that article he says:

"The whole theory of stock without par value is 'let the buyer beware,' and 'let the creditor beware,' but caveat emptor—no implied warranty of quality—applies only when goods are available for in- [fol. 44-14] spection. Better the old law 'let the promoter beware.'"

The author points out strongly his reasons for disapproving stock of no par value, and in discussing the claim that stock without par value prevents fraud, says:

"This is a worse fraud, in that it deceives stock purchasers and corporate creditors, and deceives them with no remedy. * * * It is, of course, safer for promoters to issue stock without par value for choice assortments of property, but how the investor and the public benefit has not yet appeared. * * * Stock with no par value renders easy the issue of stock representing no real value. The dangers of the old method are removed." Such stock apparently involves little or no liability of promoters, while stock with par value did involve liability. The fraud lies in selling to the public stock that represents little or nothing. There being no statutory requirement that the par value of the stock shall be paid in, the purchasers and corporate creditors must take their losses without remedy against those who originally issued the stock."

In a circular issued by the Corporation of Delaware relative to the Delaware Statute of 1917, authorizing the issue of stock without par value, it is said:

"Stock without par value can be issued fully paid in any desired amount for contracts, patents, mines, oil leases, services and similar considerations whose real value generally cannot be accurately estimated. The operation is merely an exchange of property for shares without any dollar mark of value placed upon the property or the shares and it is not open to question. It insures future stockholders absolutely against liability based on over-valuation of assets."

Corporations with stock of no par value are of comparatively recent [fol. 44-15] origin. Prior to the enactment of the general Corporation Act of 1919, corporations having such stock could not be organized in this State. The State had the power and authority to refuse to authorize and thus prevent the organization of such corporations.

Having power to prevent the organization the legislature had the authority and right to permit their organization in this State, and the admission of such corporations of other states, upon such terms as they might determine and provide by general law. In the General Corporation Act the legislature did fix the terms and conditions upon which such corporations might be organized or admitted to do business in the State and among other things provided that they should pay franchise fees and taxes based upon their no par stock considered at $100 per share.

From the above it is clear that there are important distinctions and differences between corporations having par stock and having no par stock, and such differences and distinctions form a sufficient basis for placing them in a different class and for taxing them on a different basis from corporations having par stock.

It is certainly quite possible that the legislature upon a full consideration of the entire matter, which must be presumed, might have been willing to provide for the organization and admission of such corporations, but might at the same time have thought that such cor- [fol. 44-16] porations ought not to be encouraged or even that they ought to be discouraged, and this would have been a sufficient reason of itself for providing a different method or plan of franchise taxation.

In a large number of states, we believe a majority of them, these laws have been passed authorizing corporations to issue no par stock. This certainly shows that there are some essential differences and distinctions between par stock and no par stock and between the corporations issuing them. As before stated, if there is no essential differences it is difficult to understand why such power to issue such no par stock would be desired by incorporators or granted by the legislators. In many states the legislatures have provided a different method of assession and computing the franchise tax to be paid by corporations having no par stock, as a condition of issuing such stock. This certainly is strongly persuasive that a basis for a different classification and method of taxation does exist. On page 19 of the brief and argument for the appellee appears an enumeration of some of such states.

We would again call the attention of the Court to the fact that the legislature has the right and power to determine the distinctions or differences which may be the basis for classification, and that the Courts will not interfere with such classification unless they can say [fol. 44-17] that it is palpably arbitrary and has no basis whatever; and the burden is upon the appellant to show that there is no basis or reason for making a different class of corporations having power to issue stock of no par value.

We believe that we have clearly shown that there are reasonable differences and distinctions which would justify the legislature in passing the franchise provision in question for assessing the franchise tax on corporations having no par stock; that one controlling reason is the necessity of such provision in order to assess the franchise taxes uniformly against all corporations both domestic and foreign; and that there are other distinctions and differences which the legislature might in their discretion think sufficient, with which discretion the Courts ought not to interfere, even though they might differ with the legislature, if the matter were one solely for the Court to determine.

In Stewart v. Brady, 300 Ill., 425, at page 435, the Court said:

"Classification must be accommodated to the problems of legislation and must be palpably arbitrary to authorize a judicial review of it. It cannot be disturbed by the courts unless they can see clearly that there is no fair reason for the law that would not require with equal force its extension to others whom it leaves untouched. It is competent for a Legislature to determine upon what differences a distinction may be made for the purpose of statutory classification between objects otherwise having a resemblance, though such power cannot be arbitrarily exercised and the distinction must have a rea- [fol. 44-18] sonable basis. (International Harvester Co. v. Missouri, 234 U. S., 199.) In that case attention is called to the distinction between legislative power and the wisdom of its exercise in these words: 'It is to be remembered that the question presented is of the power of the Legislature,—not the policy of the exercise of the power to be able to find fault, therefore, with such policy is not to establish the invalidity of the law based upon it.'"

Again, on page 435, the Court said:

"One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis but is essentially arbitrary. A distinction in legislation is not arbitrary if any state of facts reasonably can be conceived that would sustain it, and the existence of that state of facts at the time the law was enacted must be assumed. (Lindsley v. National Carbonic Gas Co., 220 N. S., 61.) It makes no difference that the facts may be disputed or their effect opposed by argument and opinions of serious strength. It is not within the competency of the courts to arbitrate in such contrarity."

In the passage of this law the Legislature clearly thought it was necessary to fix a par value of no par stock for the purpose of assess-

ing the franchise taxes upon all corporations, domestic and foreign. Foreign corporations were not the same in their organization and charter provisions relating to no par stock as compared to each other or to domestic corporations. In most cases their charters do not show the amount of the authorized capital stock. The law requires that there shall be no discrimination in assessing such taxes between domestic corporations and foreign corporations admitted to do busi- [fol. 44-19] ness in the State. The legislature may also have conceived that while corporations having no par stock might be organized or admitted, such organization and admittance ought not to be encouraged, or ought to be discouraged. These were matters for the legislative discretion and determination upon facts which must be assumed to have been presented to it.

Can the Court say that there was no necessity or reason whatever for the provisions fixing a value for no par stock for the assessment and computation of franchise taxes? The Supreme Court of Massachusetts has held that there is a necessity for such a provision and that it is not unreasonable in view of the necessity. (American Uniform Co. v. Commonwealth, 237 Mass., 42. Brief and Argument for Appellee, pp. 22, 23.)

The Court cites the case of People v. Mensching, 187 N. Y., 8, as an authority that the provision in question is unconstitutional. We believe the Court has not fully considered the distinction of that case made on pages 20 and 21 of appellee's brief and argument. We there showed that that case has no reference to corporate stock of no par value, but only to corporate stock having different par values.

The recent case of Detroit Mortgage Corporation v. Secretary of State, 211 Mich., 320, is much in point on several of the questions involved in this case. The corporation was a deleware corporation originally having preferred and common stock of par value, but [fol. 44-20] later amended its charter changing its common stock to stock of no par value. After the amendment to its charter was filed in Michigan the question arose as to the amount of the franchise tax to be paid. The statute provided for a franchise tax upon foreign corporations based upon the proportion of the authorized capital stock represented by its tangible property in Michigan. The laws of Delaware provided that no par stock should be considered as having a par value of $100 per share for the purpose of assessing franchise taxes by the State. The Michigan statute had no provisions relative to taxes based on no par stock.

In holding that the Secretary of State was right in considering that the no par stock of the Delaware corporation had a value of $100 per share for the purpose of fixing the franchise tax in Michigan, the Court, at page 324, said:

"The act in question (Michigan statute) was designed to regulate the admission of foreign corporations to the State, and to obtain a revenue by requiring as a condition to such admission the payment of a franchise fee, and in providing for the payment of a franchise fee the legislature quite carefully and specifically provided that the

fee should be collected upon the authorized capital stock of the corporation. * * * Several states of the Union, Delaware included, have recently passed laws permitting corporations to issue stock having no par value. * * * When one of the corporations so organized submits to defendant its papers, they show upon their face that the stock had no par value; there is nothing upon the face of the papers showing *the amount of the authorized* capital [fol. 44-21] stock." (Last italics ours.)

Again, on page 325, the Court says:

"*The State of Delaware could prescribe the terms and conditions under which corporations might be therein organized. Such terms and conditions as it saw fit to prescribe regulated and controlled such corporations and became in effect a part of their charters. When by the provisions of the act of the legislature of that state corporations were permitted to issue stock with no par value, there was coupled with such right a proviso that for the purpose of franchise taxes such stock should be taken to be of the par value of $100 each.* This provision was as effectively a part of the corporation's charter as though written therein." (Italics ours.)

"In the instant case the plaintiff, when originally incorporated in Delaware, fixed the par value of its common stock at $10 per share; upon that par value it paid its franchise fee to the state. When it amended its articles of association to take advantage of the act of the Delaware legislature of 1917, it took with the advantages such disadvantages as the act itself imposed. One of these disadvantages was fixing a value for taxation purposes of $100 per share."

This case clearly approves the power of the legislature to fix an arbitrary value for shares of no par stock for franchise tax purposes, and clearly implies that there is sufficient reason and distinction for such legislative action. It further shows that without some fixing of such arbitrary value for no par shares, either in its charter or the laws of the state where it seeks admission, there is no basis for the computation of the franchise tax on a foreign corporation as the amount of the authorized capital stock cannot be determined. It further shows that the corporation having elected to issue no par stock, is subject to all of the provisions of the laws of state under [fol. 44-22] which it is incorporated, and along with the supposed advantages must pay the franchise taxes on the basis provided by such laws.

III

We believe that the Court has failed to consider the practical and legal effect of its construction that the amount in dollars of the no par value stock of a corporation must appear in the charter of the corporation, and that the provision in Section 105 of the General Corporation Act fixing a value of $100 per share for stock of no par value for the purpose of computing the annual franchise tax is unconstitutional and void.

It must be remembered that the annual franchise tax as well as the initial franchise tax, on domestic and foreign corporations, must

be uniform. Under the Courts holding there is no basis upon which the annual franchise tax on many foreign corporations can be assessed and computed. They have been admitted and are transacting business in the State and yet there is no way to arrive at the franchise tax which the law requires to be assessed against them, if the provision in question is unconstitutional. This being true, if foreign corporations having stock of no par value cannot be compelled to pay such tax, it must fail also as to domestic corporations having no par stock for it certainly was not the intention of the legislature to collect the tax from domestic corporations if it cannot be collected [fol. 44-23] from foreign corporations. Moreover, if the annual franchise tax cannot be enforced against corporations having no par stock, it must fail as to those which have par stock, for the legislature could not have intended to collect an annual franchise tax from corporations which have stock par value and not from those having stock of no par value.

Again, if this provision of Section 105 is unconstitutional and void, it may be urged with much reason that corresponding provisions of Sections 96 and 101, which relate to the initial franchise taxes on domestic and foreign corporations respectively, which have stock of no par value, are unconstitutional and void. Moreover, if the initial franchise taxes cannot be assessed against corporations having stock of no par value, then such taxes cannot be assessed against domestic and foreign corporations having par value stock. The result is that if this opinion is correct, all of the franchise tax provisions in the law are probably void and unenforceable, the entire franchise tax plan and system of the General Corporation Act fails, and the State will be deprived of several million dollars annually in franchise taxes on corporations.

Again, the very right and power to issue no par stock is coupled with the provisions that the corporation shall pay initial and annual franchise taxes based upon the no par stock at $100 per share. If such franchise tax provisions are void and unenforceable, then it [fols. 44-24-46] would seem that the provisions of no par stock also must fail and become void and the legality of no par stock heretofore issued is clouded and doubtful.

Again, referring to that portion of the opinion which holds that the charter of domestic corporations must state the amount in dollars of the authorized capital stock of the corporation, there have been hundreds of corporations chartered in this State since the General Corporation Act became effective in 1919, whose charters do not state the amount in dollars of the corporate stock having no par value. Many of these corporations did not state in the charter the price or consideration at which the no par value stock should be issued, but such consideration at which the no par value stock should be issued, but such consideration was left to be fixed by the board of directors from time to time, as provided in Section 32.

Difficult legal questions arise as to what are the legal rights and powers of such corporations whose organizations were not in compliance with the law as construed by the opinion in this case.

In view of all of the above and foregoing, we respectfully submit that a rehearing should be granted in this case.

Edward J. Brundage, Attorney General, Solicitor for Appellee. Clarence N. Boord, Assistant Attorney General.

[fol. 46-1] IN SUPREME COURT OF ILLINOIS

[Title omitted]

REPLY TO PETITION AND AMENDED PETITION FOR REHEARING—Filed April 19, 1924

The petition for rehearing filed herein and also the amended petition incompletely state the underlying essential fact in this case. The bill of complaint filed in the court below, being page 4 of the record, and abstracted on page 2 of the abstract of the record, clearly sets forth that the total amount of the authorized capital stock of the appellant is $150,000. This allegation of the bill was admitted by demurrer. The allegation in full is as follows:

"Said amendments to the charter of complainant and a certificate thereof duly executed according to law were duly filed in the office of the Secretary of State on July 1, 1921, and such amendments [fols. 46-2] have been in full force and effect from July 1, 1921, to the present time and fully set forth that $150,000, consisting of 1,000 shares of preferred stock of the par value of $100 per share and 10,000 shares, of no par value common stock, which is fully paid up at $5 per share, constitute all of the capital stock authorized by complainant's charter."

The argument in the petition for rehearing, to the effect that the court erred in its conclusion that the total amount of authorized capital stock must be stated in a sum of money in the statement of incorporation and in the charter is answered by the plain language of the statute, the opinion of this court on this point as stated herein and as stated in many previous opinions. This court's opinion in this respect is in conformity to the construction of such languge by the courts of last resort of practically all jurisdictions in the United States.

All of the statements summarized on page 10 of the original petition, apply with equal force and in the same manner to par value stock as to no par var value stock. Par value tock may be issued for any sum not less than five dollars nor more than one hundred dollars per share and these are the identical limits fixed as the issuing prices of no par value shares. Par value stock may be paid for in full by the assignment to the corporation of intangible assets such as good will, patents, patent rights, etc. Par stock may also be sold for more than its par value to the same extent as the no par value stock may be sold for more than the sum paid into the corporation as payment in full for the issuance of previous blocks

or issues of such stock. The only limitation is that par value stock cannot be issued for less than the par value, and an equivalent limitation is placed upon the issuance of no par shares, as the court points out, in that no par shares cannot be issued for a less sum than the part of the total authorized capital stock which said no par value shares represent.

[fol. 46-3] The Corporation Act requires only that the total amount of the authorized capital stock be specified at the time of the incorporation of the company or at the time of an amendment to the corporate charter. It does not require that the issue price per share of no par shares be fixed at that time except that the number of shares of no par value stock and the part of the authorized capital stock represented by them must both be stated in the charter, and thus fixes an average minimum sum below which no par value shares may not be issued as fully paid. The court in its opinion has stated a practical rule for arriving at said average minimum sum and that rule has been followed by the profession for some time in drafting charters containing the no par stock feature.

There is no provision in our corporation law which requires corporations, whether par value or no par value, to capitalize surplus. Corporations being authorized to issue only par value stock may issue only part of it at the time of incorporation and may subsequently issue additional shares of stock and sell the same greatly in excess of the par value. The sum in excess of the par value is placed in the surplus account of the corporation. This same kind of financing may be done also with no par value stock. There is no distinction on this point between corporations using the two kinds of stock.

Appellee's argument as to the intention of the legislature is an argument which assumes the conclusion sought to be proved, and therefore begs the question. The answer to his thought in this regard is that the legislature quite palpably misconstrued its own enactment or erroneously considered the act within its constitutional powers. The history of the legislation in this respect, while it is interesting, is not, as we understand the law, relevant to the issues involved in this case.

[fol. 46-4] The argument in the appellee's petition, on pages 8 and 9 of the amended petition, admits rather than answers the logic of that part of the court's opinion there quoted.

We respectfully point out to the court that the substance of the petition under headings II and III, beginning on page 9, is a matter of argument entirely and does not set forth the points supposed to have been overlooked or misapprehended by the court with proper reference to the particular portion of the original abstract and brief relied upon.

Foreign corporations having no par value stock may be required to answer any questions which may be propounded by the Secretary of State. They are required by Section 82 to specify in their application for admission the total amount of their authorized capital stock and also what part of it they intend to use in the State of Illinois, if admitted. Whether or not foreign corporations heretofore admitted to this state have in all cases been required by the

Secretary of State, the appellee herein, to state facts from which the total amount of their authorized capital stock can be determined we cannot say. The statute, however, gives the Secretary of State full power in the premises to require a statement of facts from which he can determine said sum and from which he can determine the proportion of the total authorized capital stock which the foreign corporation uses in this state. The proportion on which such foreign corporation pays is the same as that upon which a domestic corporatin pays, namely, the percentage represented by business conducted and property located in the State of Illinois.

We pointed out in our principal brief, on pages 15 and 16, and in our reply brief, pages 14 and 15, that the American Uniform case, [fol. 46-5] in 237 Mass. page 42, is not analogous to the case at bar.

We submit that no par value stock has no more voting power and is no more adaptable to the control of a corporation than is par value stock. Of course 20 shares of no par value stock issued for $100 have 20 votes, whereas 1 share of preferred stock of $100 par, in the same corporation, has only 1 vote, but the same is true if the preferred stock be no par value stock and issued at $100 per share. The same situation would also exist if the common stock consisted of $5 par value shares. In this last contingency $100 would buy 20 shares of common stock conferring 20 votes and only 1 share of preferred stock, conferring 1 vote only.

The quotation from the article of William W. Cook, in the American Bar Association Journal, is not an argument in favor of appellee's contention in this case but is an argument in favor of the contention of the appellant. The gist of the argument in that article is that where corporations can be formed and authorized to issue no par shares without stating in their charter a given amount of money which those no par shares shall represent, then and under that sort of a law no protection against fraud is furnished the stock purchasers, or corporate creditors of the corporation. The corporation acts attacked by Mr. Cook were acts which permit corporations to state in their charters that they desire an authorized capital stock of so many shares of no par value. Obviously such stock may be issued and paid for in full for any consideration which the promoters may see fit to accept and the real value of the stock must be determined by access to the books of account of the corporation and no information as to its value at the date of incorporation or subsequently is furnished by the corporate charter or any public record. States having [fol. 46-6] such a law are, among others, Delaware, as appellee states. The states having such statutes are the very same states which have an arbitrary valuation clause in the franchise tax portion of their corporation acts. Appellee's argument in this case is that our law should be construed to read the same as the laws of the states above referred to, and if our law were so construed it would come under the condemnation of Mr. Cook. His argument and reasoning, therefore, is in favor of the construction which the court has already placed upon our statute.

The power to organize domestic corporations and to admit foreign corporations having no par stock does not include the power to vio-

late the constitution of the state and of the United States by discriminating against corporations having stock of no par value, already organized or admitted. If the argument of the appellee in his petition for rehearing were sound on this point then the state could tax the property of a corporation at a different rate than the same kind of property belonging to an individual because an individual exists without the creative act of the state, whereas the corporation is created by the state. The unsoundness of this argument is too evident for further comment.

We respectfully show the court that the Detroit case, 211 Mich. 320, set forth at length in the amended petition for rehearing, if considered as being the law of this state, is a complete answer to the argument of the appellee that it must tax domestic no par corporations at an arbitrary and confiscatory valuation in order to tax them uniformly with foreign no par corporations. The decision of the Michigan court, if good law, makes such uniformity impossible since the law of the state of origin fixes the valuation of the capital stock of no par corporations for the purpose of taxation in every state in the Union, and these methods of valuation will necessarily [fol. 46-7] vary in the various states. We do not believe the Michigan case to be good law, nor do we believe that that case or the reasoning in it has any bearing upon the problem presented in this case. The cases on that subject are reviewed in an able opinion of the Supreme Court of Texas, in the case of Staple v. Kirby, published in 250 S. W. Rep. 293, which reaches a decision exactly opposite to that of the Michigan case.

The argument of appellee that the decision filed herein destroys the basis upon which the annual franchise tax of foreign corporations is assessed and computed, is clearly unsound. There is ample provision in the law to enable the Secretary of State to assess every corporation, domestic or foreign, upon a uniform basis, and therefore the franchise tax as a whole is sound and does not fall because of the decision rendered in this case.

We submit that it is immaterial that the corresponding provisions in Sections 96 and 101 may hereafter be attacked as unconstitutional. The questions which should be raised by the petition for rehearing are questions relative to the issues in this particular case and the correctness of the decision of the court rendered in this case. However, even assuming the arbitrary valuation clause in the initial fee sections to be unconstitutional, the act is not thereby rendered unworkable but is in our opinion considerably improved. The effectiveness of the Corporation Act as a revenue producer would be greatly enhanced by reason of the fact that numerous business concerns located in Illinois, now incorporating in other states because of the prohibitive fees charged by Illinois for the privilege of using no par value stock, would incorporate in Illinois if such prohibitive initial fees were eliminated.

[fol. 46-8] We submit, however, that the decision in this case does not necessarily render invalid similar provisions of the statute as to the method of computing the initial fee. The distinction between

the two sections are set forth on pages 8 and 9 of our reply brief and argument.

The argument in the petition for rehearing, which urges the court to sustain this discriminatory tax because charters have been issued to corporations which have not specified the amount of their authorized capital stock represented by no par shares, is unsound. The remedy for that situation is to require such corporations to comply with the law and file the necessary amendments to their charters so that the charters will comply with the law in this respect. The Corporation Act clearly requires (Section 4) "a statement of incorporation setting forth the following":

"(8) The total amount of the authorized capital stock" and

"(6) The number of shares into which the capital stock is to be divided, whether all or part of the same shall have a par value * * * and whether all or part of the same shall have no par value," etc.

We respectfully point out to the court that in the typing or printing of the court's opinion the words issued and outstanding were omitted in the reference made to Section 23 of the Act. With these words included, we reprint the language of the court in the opinion in this case which we believe is a complete and final answer to the argument of appellee, that the authoribed capital stock is not required to be stated in the charter in a sum of money where it is divided into no par value shares. The court's language with the omitted words included is as follows:

Section 23 makes directors liable for assenting to an indebtedness [fols. 46-9-48] in excess of the amount of issued and outstanding capital stock of the corporation and for declaring a dividend which will impair the issued and outstanding capital stock. Section 28 requires at least one-half of the amount of an increase in capital stock to be paid in before the new stock is issued, and Section 53 makes each stockholder liable to creditors to the extent of any unpaid portion of the shares issued to him. These sections are a nullity unless the amount of the capital stock of a corporation must be stated in dollars. Whether the stock have a stated par value or have no par value stated, the corporation cannot issue the stock for less than par. In order to secure the issue of all the shares of stock there must be paid into the treasury of the corporation, in cash or its equivalent, the total amount of its authorized capital stock.

We respectfully submit to the court that the decision heretofore filed in this case should stand as the decision of this court.

Johnson, Moran, Paltzer & O'Donnell, Solicitors for Appellant.

[fol. 48-1] IN SUPREME COURT OF ILLINOIS

[Title omitted]

ARGUMENT IN SUPPORT OF PETITION FOR REHEARING—Filed April 24, 1924

Counsel for appellant state on page 1 of their reply that the bill of complaint filed herein "clearly sets forth that the total amount

of the authorized capital stock of appellant is $150,000, and that this allegation is admitted by the demurrer." Counsel then quote [fol. 48-2] from the bill setting forth the amendment of the charter, the quotation including the following:

"and such amendments have been in force and effect from July 1, 1921, to the present time, and fully set forth that $150,000, consisting of 1,000 shares of the par value of $100 per share and 10,000 shares of no par value common stock, which is fully paid up at $5 per share, constitute all of the capital stock authorized by the complainant's charter."

The allegation "that $150,000 * * * constitutes all of the authorized capital stock authorized by the complainant's charter" is a conclusion which is not admitted by the demurrer. The same paragraph of the bill sets forth "that on the 7th day of June, 1921, it amended its charter by changing its $100,000 of stock into preferred stock, but without changing the amount or par value thereof, and also increased its capital stock by the addition of 10,000 shares of no par value common stock, which charter provided should be fully paid up and non-assessable, upon the payment of $5 for each share in cash or property." This latter allegation is admitted by the demurrer, but there is no admission that the authorized capital stock of the corporation is $150,000, but only that the capital stock of the appellant consists of $100,000 of preferred stock and 10,000 shares of stock of no par value.

Counsel on page 2 of their reply to the petition for rehearing say that our argument that the Court erred in its conclusion that the [fol. 48-3] total amount of the authorized capital stock must be stated in the charter "is answered by the plain language of the statute, the opinion of the Court on this point as stated herein *and as stated in many previous opinions.* This Court's opinion in this respect is in conformity to the construction of such language *by the courts of last resort of practically all jurisdictions in the United States.*" (Italics ours.)

This is certainly a surprising statement and is evidently made for the purpose of supporting the opinion in this case by broad assertions that this Court and other courts have passed upon the question in many cases and that therefore the question is well settled in accordance with said opinion. We submit that it is most strange that such numerous cases were not cited by counsel. We have been unable to find any opinions based upon similar facts of this Court or of any other court, and we do not believe there are any such opinions in the published decisions. We believe there is no published decision of any court holding that charters of corporations having no par stock are required to state the amount in dollars of the authorized capital stock, or in other words, to establish a par value for no par stock.

On pages 2 and 3 of said reply counsel for appellant contend that it is only the average minimum price or consideration for no par stock which must be shown in the charter and that such stock may

be sold for any higher price. If this be true the effect is that every [fol. 48-4] corporation will show by its charter a minimum par value of $5.00 per share for its no par stock and will then proceed to sell it for any higher price it may fix by its board of directors. Such corporations would then pay a franchise tax upon an absolutely fictitious minimum par value, without any regard whatever to the amount actually represented by such stock.

Counsel are in the position of contending that the only difference between par and no par stock is to give corporations having no par stock the advantage of always paying a franchise fee based upon $5.00 per share of their no par value stock. This contention, we submit, is clearly erroneous and leads to absurd consequences, for it could hardly have been intended to discriminate grossly in favor of corporations having no par value stock.

Counsel say that:

"The Court in its opinion has stated a practical rule for arriving at said average minimum sum *and that rule has been followed by the profession for sometime in drafting charters containing the no par stock feature.*" (Italics ours.)

We submit that the effect of this so called "practical rule," as construed by counsel is wholly unfair and discriminatory to corporations having par value stock, and gives an unwarranted and absurb advantage to corporations having no part stock in the matter of franchise fees and taxes.

[fol. 48-5] We do not know what counsel mean- by the language above italicized. So far as the appellee has been able to find from the records of his office no such rule was ever applied by the members of the profession prior to the first Roberts & Schaefer Company case and by only a few since that decision.

Counsel for appellant on page 4 of said reply attempt to show that the total amount in dollars of the authorized capital stock of foreign corporations applying for admission to transact business in this State may be secured by interrogatories propounded by the Secretary of State. But this clearly is not true in many cases. As has been pointed out several times in the brief for appellee and the petition for rehearing, the statutes of many states do not require that the charter shall show the amount in dollars of the authorized no par stock. In many cases no price or consideration has been fixed at which such stock shall be issued, or such price or consideration may have been fixed for only a part of the no par stock authorized. Yet it is necessary to assess the franchise tax upon all of the authorized capital stock. In such cases interrogatories would be unavailing for no answers could be given which would show the total amount in dollars of the authorized no par stock. We repeat what we so often have said that as to many foreign corporations no franchise tax can be assessed upon the authorized no par stock without the fixing of an arbitrary value for such no par stock. Counsel have never [fol. 48-6] met this point and we believe there is no possible answer to it. Counsel's statement on page 7 of said reply that there is ample provision in the law, as they have construed it, to assess "every

corporation, domestic and foreign, upon a uniform basis," is clearly erroneous. Suppose a Delaware corporation has an authorized capital stock consisting of par value stock to the amount of $100,000 and 10,000 shares of no par stock, the consideration or price at which it is to be issued not being stated in the charter and never having been fixed by the board of directors, or the stockholders, or suppose the consideration for only 1,000 shares of such no par stock has been so stated or fixed. No questions by the Secretary of State could possibly secure information that does not exist, and it would therefore be impossible to assess the franchise tax on such corporation. Yet it could not have been the intention to discriminate in favor of such corporation by exempting it from the tax, or to refuse admission to such corporation. The legislature very evidently took this difficulty into consideration and provided a uniform rule or method for fixing the amount of the stock of no par value of all corporations both domestic and foreign.

It is true that many of the objections to no par stock and the evils which result from the issuance of such stock, may apply to or be charged against stock having par value. But it seems to be clear that [fol. 48-7] such evils are not thought to be so likely to inhere in par stock as in no par stock, and the legislature must be presumed to have taken this into consideration, if its purpose was to discourage the use of such stock. (Stuart v. Brady, 300 Ill., 425, 435, 436.)

Counsel on page 5 of said reply, in referring to the quotation from the article by William W. Cook in the petition for rehearing, argue that all of Mr. Cook's objections and criticisms would be overcome by requiring a minimum price, consideration, or par value to be shown in the charter of the corporation. But we submit that not a single objection would be thus overcome. According to counsel's own contention such price of consideration is not the price of consideration at which the stock is issued but only the minimum, the true consideration might be any sum above the consideration named. Such price would be fixed by the board of directors or by stockholders, and might be paid up in property value in exactly the same way as if no minimum price or par value were fixed in the charter. Just what saving vi*d*tue there is in the fixing of such minimum price or par value is a mystery to us. The fact that the stock is to be issued at a stated minimum does not prevent the sale for property at a gross overvaluation. The real valuation of the property given for the no par stock cannot be determined from the provision of the charter in any event. It may be much more or much less than the consideration fixed by the charter. The danger of overvaluation would be [fol. 48-8] just as great in the one case as the other. Every objection of Mr. Cook is just as applicable to no par stock where a minimum consideration or par value is expressed in the charter as it is to no par stock where no such minimum consideration is so fixed in the charter.

According to counsel's contentions there is not the slightest difference between corporations having par stock and those have- no par stock. They, however, contend for a construction which would result practically in corporations having no par stock paying a fran-

chise tax on a basis of $5.00 per share, although the actual price paid for such stock might be many times that amount. In this contention they go far beyond the New York cases cited by them which seem to hold that the franchise tax should be based upon the amount of capital actually paid in on such no par stock.

But if there is no difference between corporations having par stock and those having no par stock, we again ask why corporations through their representatives have urged the passage of laws authorizing no par stock. There surely must be some advantages to such corporations, and their promoters, incorporators and stockholders, otherwise there would have been no demands for the passage of such laws.

In 1921 appellant voluntarily amended its charter under the General Incorporation Act of 1919 and secured the right under that Act [fol. 48-9] to issue stock of no par value. It accepted the benefits of that Act and became subject to its burdens. It paid a tax on the increase of its capital stock based upon its no par stock at $100 per share without objection. It thus acknowledged the right of the State to assess a tax upon the increase of its capital stock on such basis, and by voluntarily requesting and receiving the right to issue such stock it acknowledged the right and power of the State to assess all franchise taxes then provided for, or which might afterward be provided for by law, upon a basis of $100 per share for such stock. In other words the right and authority to assess the franchise taxes and the duty to pay such taxes on a basis of $100 for each share of no par stock became a part of its charter, and is a condition upon which it shall transact or continue to transact its business in the State.

As has been so often pointed out in this case, the provisions of the General Corporation Act fixing a value of $100 per share for no par value stock is not a discrimination but an absolute necessity in order to assess the franchise taxes provided for in the act uniformly against all corporations, domestic and foreign. This absolute necessity furnishes an entirely sufficient distinction and basis for the rule established by the provisions in question and similar provisions in other sections of the Act, even if there were no other distinction or basis for classification, which we do not admit.

[fol. 48-10] It is perfectly legal and constitutional to provide that all corporations, domestic and foreign, shall pay an annual franchise tax based upon the proportion of their authorized capital stock, including stock of no par value, represented by property and business in the State. In order to secure the assessment and payment of such a tax by all such corporations, it is absolutely necessary to fix a value for the no par value stock of corporations having such stock. A provision cannot be unconstitutional which is necessary in order to accomplish a legal and constitutional purpose. (American Uniform Co. v. Commonwealth, 237 Mass. 42. Brief and Argument for Appellee p-. 22, 23.)

Counsel refer to and criticise the case of Detroit Mortgage Corporation v. Secretary of State, 211 Mich., 320, cited and quoted from on pages 20 and 21 of the petition for rehearing. That case held that the provision of the Delaware statute fixing a value of $100 per share on no par stock of Delaware corporations for franchise tax

purposes would be applied in Michigan where the statute of that state provided for a franchise fee based upon the authorized capital stock of the corporation and where there was no provision fixing a value for no par stock for such purpose. We are aware that there is a conflict of authority as to whether a provision fixing such value [fol. 48-11] for no par stock in the State where the corporation is organized, becomes a part of the charter so as to be applicable and binding in other States. We think that it is doubtful, and believe the decision in the Michigan case was based upon the necessity to fix some such value in order to assess the franchise tax in Michigan. We do not believe such a provision in the State where the corporation is organized would apply where the foreign State has fixed a rule for the valuation of no par stock for franchise tax purposes.

We cited this case to show that where the franchise tax is based upon a proportion of the authorized capital stock it is absolutely necessary that some arbitrary value be fixed in the statute for the no par stock in order to assess the tax, and that this necessity was sufficient reason for the provisions of the General Corporation Act.

In the Texas case, Staple v. Kirby, 250 S. W. Rep. 293, the Court held that the provisions of the Delaware statute fixing the value of no par stock for franchise tax purposes is not applicable in a foreign state, which has no provision fixing a value for no par stock for franchise purposes. But in that case the Court held that there was no necessity for applying the provision of the Delaware statute as the Court construed the "capital stock" of the corporation to be the same as the "capital" in use in the State. The statute of Texas based the tax upon the proportion of the capital stock and surplus in the State. The Court in effect held that the tax was not based upon the au- [fol. 48-12] thorized capital stock, but upon the proportion of the capital and surplus of the corporation represented by the property and business in the State. But in Illinois the franchise taxes are not based upon the capital but upon the authorized capital stock, whether issued or not.

On page 7 of said reply counsel say that it is immaterial that Sections 96 and 101 may hereafter be attacked as unconstitutional. In effect they say that only the constitutionality of the amendment of 1923 to Section 105 is in controversy. We respectfully submit that the legislature has clearly shown an intention to provide a uniform method of assessing and collecting franchise taxes, initial and annual, upon corporations having stock of no par value, and it is the right and duty of this court to consider all such provisions for the purpose of determining the intention, the necessity for such provisions and the effect thereof. These provisions are highly analogous and should be fully considered in arriving at a decision in the case.

If the specific provision in question is finally held to be unconstitutional it will be urged that all similar provisions are likewise unconstitutional. In fact, since the filing of the opinion in this case several cases have been filed in the Circuit Court of Sangamon County to enjoin the payment of franchise taxes assessed under Sections 96 and 101 of the Act. There have also been a number of claims filed

in the court of claims seeking an award for taxes heretofore paid under said sections. Certainly a very strong argument can and will [fol. 48-13] be made that if the said amendment to Section 105 is unconstitutional similar provisions of Sections 96 and 101 must be unconstitutional. If such provisions are unconstitutional then the entire plan of assessing and collecting franchise taxes as provided in the General Corporation Act will probably fail. We believe the court can and will take these matters into consideration in this case.

Counsel in closing said reply refer- to that portion of the opinion which relates to Sections 23, 28 and 53 of the said Act and which states that "these sections are a nullity unless the amount of the capital stock of a corporation must be stated in dollars."

In this statement we believe the opinion errs. Section 23 makes the directors liable for assenting to an indebtedness in excess of the amount of the issued and outstanding capital stock and for declaring a dividend which *s*hall impair the issued and outstanding capital stock. We respectfully submit that in determining the amount of the issued and outstanding no par stock it is not necessary to refer to the amount in dollars of capital stock stated in the charter. After the issue of such stock it can be determined from the reports of the corporation and the amount in dollars of the no par stock which have been issued and are outstanding. The price or consideration fixed and received must be shown in the books and reports of the corporation [fol. 48-14] and this determines the amount of no par stock issued and outstanding within the meaning and intent of this provision.

We do not see that there is the slightest difficulty in complying with Sections 28 and 53. Section 28 merely requires that the statement of stock issued subsequent to incorporation shall show that "of the capital stock then issued at least one-half has been paid in, in money or property." When this statement is made the consideration of the no par stock has been fixed and it is easy to determine whether one-half of the stock at the said consideration so fixed has been paid in. Section 53 makes each stockholder liable to creditors to the extent of the unpaid portion of the shares issued to him. If such shares are of no par value, then he is liable for the difference between what he has paid and the consideration which has been fixed for such shares, whatever that consideration may be.

We respectfully submit that the amendment to said Section 105 is not unconstitutional, but on the contrary is a necessary and valid classification in order to uniformly assess and collect the annual franchise tax against all corporations, domestic and foreign, transacting business in this State, and that the decree of the Circuit Court should be affirmed.

Respectfully submitted, Edward J. Brundage, Attorney General, Solicitor for Appellee. Clarence N. Boord, Assistant Attorney General, of Counsel.

[fol. 49] IN SUPREME COURT OF ILLINOIS

[Title omitted]

ORDER ALLOWING PETITION FOR REHEARING—April 10, 1924

Now on this day the Court having duly considered petition for rehearing filed herein and the Court being now advised in the premises doth grant the prayer of the petition and allow a rehearing of this cause.

[fols. 50 & 51] IN SUPREME COURT OF ILLINOIS

[Title omitted]

SUBMISSION OF CAUSE ON PETITION FOR REHEARING—April 14, 1924

Now on this day come the parties hereto and this being one of the days set apart for the call of the docket under the rules of this Court, and it appearing to the Court that, a rehearing having been allowed, appellant hath filed herein a duly certified transcript of the record and proceedings of the Court below, together with printed abstracts thereof, and briefs and arguments of counsel in support of the errors assigned herein, and entered motion to reverse the judgment and remand said cause and for costs, and the said appellee having entered motion to affirm said judgment and for costs and procedendo, and said motions being taken under advisement for final hearing, and the Clerk of this Court reporting that said cause is now ready to be taken, and said cause on briefs, petition for rehearing, answer, and reply, is here submitted for the consideration and judgment of the Court:

Therefore it is ordered by the Court that this cause be and the same is hereby taken under advisement.

[fol. 52] IN SUPREME COURT OF ILLINOIS

[Title omitted]

OPINION—Filed June 17, 1924

Mr. Chief Justice CARTER delivered the opinion of the court:

Appellant, the Robert & Schaefer Company, a domestic corporation, filed its bill in the circuit court of Sangamon county against Louis L. Emmerson, Secretary of State, alleging that the total amount of its authorized capital stock is $150,000; that it is divided into 1,000 shares of preferred stock of the par value of $100, and 10,000 shares of common stock of no par value, issued as fully paid at $5 a share; that under section 105 of the general Corporation act its annual franchise tax should be $75; that the amendment to the

section added in 1923, fixing the value of all stock of no par value at $100 a share for the purpose of the annual license or franchise tax, is unconstitutional; that the Secretary of State had refused to accept $75 tendered to him by appellant and demands $550 as the annual franchise tax due from appellant and threatens to enforce his demand by inflicting the statutory penalty. Appellant prayed that the court grant a mandatory injunction against appellee to accept $75 in full for the annual franchise tax due from appellant for the year beginning July 1, 1923, and for other relief. On demurrer the court held the amendment constitutional and that the tax demanded by the Secretary of State was due from appellant. Complainant having elected to abide by its bill, the bill was dismissed for want of equity. This appeal followed.

It is urged that the language at the end of section 105 of the Corporation act added by amendment in 1923 is unconstitutional because violative of section 1 of article 9 of the constitution, which authorizes the General Assembly to tax corporations "owning or using franchises and privileges, in such manner as it shall from time to time direct by general law, uniform as to the class upon which it operates."

Section 105 as amended in 1923 provides: "Each corporation for profit, including railroads, except insurance companies, heretofore or hereafter organized under the laws of this State or admitted to do business in this State, and required by this act to make an annual report, shall pay an annual license fee or franchise tax to the Secretary of State of five cents on each $100 of the proportion of its capital stock, authorized by its charter in the office of the Secretary [fol. 53] of State, represented by business transacted and property located in this State, but in no event shall the amount of such license fee or franchise tax be less than that required by this act of corporations having no tangible property or business in this State. In the event that the corporation has stock of no par value, its shares for the purpose of fixing such fees shall be considered to be of the par value of $100 per share." (Smith's Stat. 1923, p. 507.)

All of the property of appellant is located and all of its business is transacted in this State. If the language italicized in section 105 above is unconstitutional, the appellant is required only to pay the smaller amount of $75, according to its contention; if constitutional, the company is required to pay the larger amount demanded by the Secretary of State. A decision to the effect that the italicized language in section 105 is unconstitutional will also invalidate the same language found at the end of section 107 as originally passed in 1919.

Appellant's contention is that under the Corporation law of Illinois its no-par-value stock must be valued at $5 a share,—the amount at which it is fully paid up and the lowest amount for which, under the General Corporation act, no-par-value stock may be sold. Computing the annual franchise or license tax upon this basis appellant would be obligated to pay $75. The larger amount demanded by the Secretary of State is based upon the amendment of 1923, providing that no-par-value stock shall be considered as of

the par value of $100 per share for the computation of the franchise tax. Appellant contends that the total amount of authorized capital stock of a corporation must be stated in money in the application for incorporation, and that this amount is the necessary basis for the franchise tax, and that to establish a specific basis of $100 for the valuation of no-par-value stock is unconstitutional, as establishing a method of taxation not uniform as to the class of corporations upon which it operates.

Before passing on the constitutional issue raised in this case it is necessary to determine the place of no-par-value stock in the general Corporation act as revised in 1919. Such an inquiry is necessary to discover whether there is an actual discrimination bringing the amendment of 1923 within the constitutional prohibition against the taxation of corporations "owning or using franchises and privileges" in a manner otherwise than "uniform as to the class upon which it operates." The general Corporation act of 1919 was a [fol. 54] revision of the laws of Illinois regarding corporations for pecuniary profit. It must be construed as a whole. In its construction it must be borne in mind that no-par-value stock was an innovation introduced in the 1919 revision of the corporation laws of this State,—a revision based primarily upon previously existing laws providing only for stock with a par value. It will be well to review briefly the provisions of the general Corporation act bearing upon no-par-value stock. The provisions of that act of primary interest in this connection are paragraphs 6, 8, 9 and 10 of section 4, and sections 23, 28, 32, 53, 96, 101, 105 and 107.

Inasmuch as the basis for the construction of the act rests primarily upon section 4, perscribing the requirements of the statement of incorporation, it will be worth while to set out the germane paragraphs of that section. The statement of incorporation must indicate, among other things: "(6) The number of shares into which the capital stock is to be divided, whether all or part of the same shall have a par value, and if so, the par value thereof, which shall not be less than $5, nor more than $100 per share, and whether all or part of the same shall have no par value. * * * (8) The total amount of authorized capital stock. (9) The amount of such stock which it is proposed to issue at once (which shall not be less than $1,000, all of which must be subscribed.) (10) The payment of at least one-half of the capital stock, which it is proposed to issue at once, with a description of the nature and value of property, if any, paid for such capital stock."

Appellant contends that the provisions quoted above from section 4 require the statement and articles of incorporation to prescribe definitely, in money, the total value of all authorized capital stock, whether of par value or no par value, or both, and that such articles of incorporation necessarily furnish the basis, and a definite basis, for the franchise tax imposed under section 105. Appellee contends, on the other hand, that "the total amount of authorized capital stock," in so far as it is represented by shares of no par value, is not required to be stated in dollars in the articles of incorporation, and that it is therefore necessary for the legislature to establish a definite value for

such shares in order to fix a basis for computing the annual license or franchise tax upon the total money value of authorized capital stock.

Section 4 expressly requires the statement of incorporation to set [fol. 55] forth the number of shares into which the capital stock is to be divided, indicating whether or not all or a part of the same shall have no par value. This is supplemented be a required statement of the total amount of authorized capital stock; a statement of the amount of such stock to be issued at once, which shall not be less than $1,000; and the payment of at least one-half of the capital stock which is proposed to be issued, at once. Appellant contends that the reference to the amount of stock means a definite amount in money, and that this construction becomes clear when the statement regarding the amount of authorized capital stock is coupled with the requirement that the amount proposed to be issued at once shall not be less than $1,000. Appellee, on the other hand insists that the very nature of no-par-value stock implies an absence of specific value, and that the requirements of section 4 are met, and can readily be met, by a statement of the value of proposed par-value stock and of the number of shares of proposed stock of no par value. He contends that under his construction the minimum of $1,000 can be met either by the issuance of par-value stock, or of no-par-value stock whose sale price is determined in the articles of incorporation, or by a combination of the two. Both the appellant and the appellee contend that their constructions are supported by other provisions of the act. It may be worth while, therefore, to examine briefly certain other sections of the act.

Section 28 relates to the report of stock issued within the authorized limit but not previously reported to the Secretary of State as issued. The second numbered paragraph of this section provides that the statements as to the issuance of such additional stock shall contain a statement that "at least one-half has been paid in," just as paragraph 10 of section 4 requires a similar statement in connection with the original issue of capital stock. It is contended that section 28 makes it clear that no-par-value stock is to have a money value specified in the original statement of incorporation, such money or par value of no-par-value stock to be controlling as the basis for taxation. It is quite clear that if section 4 does not require the amount of original authorized capital stock to be stated in money, whether it is par-value stock or no-par-value stock, section 28 does not make such a requirement, because it merely imposes as to future issues a condition imposed by section 4 as to original issues. It seems more reasonable to assume that sections 4 and 28 should be construed with [fol. 56] reference to the first sentence of the second paragraph of section 32, which reads as follows: "Subject to the provisions of this section, the corporation may issue and sell its shares of stock having no par value from time to time for such consideration, not less than $5 nor more than $100 per share, as may be prescribed in the certificate of incorporation or as from time to time may be fixed by the board of directors pursuant to authority conferred in such certificate." If section 32 is to be given effect, it clearly indicates that the determination of the sale value of no-par-value stock, within the limits

prescribed by section 32, may under certain conditions be made after the statement of incorporation. If such sale value is determined after the statement of incorporation, it follows either that the statement of incorporation is not required to include a statement of such value, or that a value appearing in the original statement of incorporation is not necessarily controlling as to the future sale value of such stock.

Section 32, when construed with section 4, directly supports the contention of appellee that the money value of no-par-value stock is not required to be contained in the statement of incorporation, and that some definite value must be placed upon such stock by statute, for the purpose of computing an annual license or franchise tax. The amount actually received for no-par-value stock is, of course, capable of determination when, under the terms of section 32, a sale value has been placed upon such stock, but may not be known at the time of filing the statement of incorporation. By the terms of section 32 it would appear that if a money value for no-par-value stock were stated in the original statement of incorporation, an amendment to the certificate of incorporation may permit a subsequent valuation of such stock by the board of directors for the purpose of sale. Section 32 is in the alternative, and expressly permits the sale of no-par-value stock at an amount specified in the certificate of incorporation, or at an amount fixed by the board of directors pursuant to authority conferred in such certificate. Apparently a combination of the two plans is permitted, and the original certificate may specify a value of issues to be made at once, and at the same time authorize the directors to fix a sale value for subsequent issues. In all of the cases in which the articles of incorporation employ the second alternative, either as to the whole or a part of proposed no-par-value issues, the money value of the total authorized capital stock cannot be known at the
[fol. 57] time of filing the original statement of incorporation. Under such conditions the whole or a part of no-par-value issues must be stated in number of shares and not in money, for the money value is not yet determined.

As we construe the general Corporation act, the statement of incorporation may specify one or more of three types of authorized stock issues: (1) Par-value stock, whose par value must appear in the statement; (2) no-par-value stock, upon which a value is prescribed in the certificate of incorporation; (3) no-par-value stock whose value "from time to time may be fixed by the board of directors pursuant to authority conferred in such certificate." Apparently the value specified in the statement of incorporation for the second class of stock just mentioned may, so far as such stock is unsold, be subsequently altered by the board of directors if the certificate of incorporation confers such authority. The money value of authorized stock issues of both the second and third classes may, therefore, not be capable of determination until a subsequent action of the board of directors, although the certificate of incorporation must almost, of necessity, fix a sale value upon no-par-value stock that is proposed to be issued at once. The tax is based upon a money valuation of authorized capital stock. No pecuniary standard for

measuring the value of such authorized stock exists as to the third group specified above, and the certificate of incorporation may apparently be so drawn as to permit variations by the board of directors as to the second group. It is difficult to discover how, under these circumstances, the act can be construed to require that the statement of incorporation places a definite money value upon all shares of no-par-value stock.

In Armstrong v. Emmerson, 300 Ill. 54, we spoke of the capital stock as "an invariable sum fixed by the charter," and in People v. Emmerson, 305 Ill. 348, we say that the capital stock "is the sum total fixed by the charter or articles of incorporation." These statements are precisely correct with respect to corporations having only par-value stock, but under section 32 of the general Corporation act of 1919 an element entering into this sum as to no-par-value stock is not required to be fixed in money by the articles of incorporation but may be left to the later determination of the directors.

Section 23 of the general Corporation act makes the directors liable for assenting to an indebtedness in excess of the capital of the corporation or for declaring or assenting to a dividend that will [fol. 58] impair its capital, and section 53 imposes a liability upon each stockholder "to pay his pro rata share of such debts and liabilities, to the extent of the unpaid portion of the stock, after exhausting the assets of such corporation." Section 53, and the liability thereunder, apply only after the sale of stock, whether the value for such sale be determined by the articles of incorporation, or subsequently by the directors under the authority of the articles of incorporation. Substantially the same statement applies to section 23. If the sale value has not been fixed upon no-par-value shares of capital stock either by the articles of incorporation or by a subsequent authorization of the board of directors, it necessarily follows that such stock has not yet been sold. Section 23, in dealing with the liabiilty of directors, says that "for the purposes of this section the capital of the corporation shall be considered as the aggregate amount paid in on its shares of capital stock issued and outstanding." The liability of directors and shareholders under sections 23 and 53 can accrue only after a sale value has been fixed upon the no-par-value stock and the stock itself is outstanding. They have no bearing as to the method of fixing such value or upon the construction of the language of section 4, and in no way support a view that section 4 requires the statement of incorporation to give a money value to no-par-value stock authorized to be issued.

Construing the general Corporation act as a whole and with reference to the purpose in authorizing no-par-value stock, we are of the opinion that there is no requirement that a money value be given to no-par-value stock authorized by the articles of incorporation. If the articles of incorporation do not place a money value upon no-par-value stock authorized to be issued, and, if, as is provided by section 32, they vest in the directors an authority at some subsequent time to fix a sale value of such stock, it necessarily follows that under appellant's construction the annual license or franchise tax imposed upon the corporation will prove ineffective as to

corporations having no-par-value stock, because there will be no total money value of authorized capital stock upon which to compute the tax. Unless such corporations exercise their option to fix a cash value for all such stock in the original articles of incorporation, or unless a definite value is fixed upon such stock by statute for the purpose of computing such a tax, the State has no fixed basis for imposing the tax, while it has such a basis for corporations using par-value stock alone.

[fol. 59] The issue presented in this case therefore comes down to this: The General Assembly cannot, under the law as it now stands, effectively levy an annual license or franchise tax upon corporations having no-par-value stock unless it has authority to prescribe a definite value for such stock for the purpose of computing a franchise tax. The General Assembly must either require the corporation to place a definite and specific value upon all stock, or it must have authority to fix such a value for the purpose of computing the tax on no-par-value stock if it is to retain the power to levy an annual franchise tax based upon the authorized capital stock of a corporation. To require the corporation to place a specific value, in advance, on all stock is to a olish no-par-value stock. The issue becomes one as to whether the General Assembly has authority, at the same time, to authorize no-par-value stock, and to fix a definite valuation upon such stock for the purpose of computing franchise taxes. The General Assembly has taken the view that for the purpose of computing fees and taxes it is necessary to place a definite value, in advance, upon authorized no-par-value stock, whose actual sale value may, if the corporation desires, be subsequently determined by action of the corporation. This is clearly indicated by the fact that the general Corporation act as passed in 1919 contained in sections 96, 101 and 107 provisions that for computing initial fees and for franchise taxes on certain corporations, no-par-value stock should be considered to be of the par value of $100, and by the amendment of 1923 to section 105 of the act making the same provision with reference to the normal computation of the annual license or franchise tax.

It is objected that the amendment of 1923 to section 105 violates the requirement of section 1 of article 9 of the constitution that with respect to corporations owning or using franchises and privileges the tax shall be "uniform as to the class upon which it operates." It is contended that there is no distinction authorizing a classification of no-par-value stock differently from par-value stock. Inasmuch as the annual license or franchise tax is computed as a percentage of the record value of authorized capital stock of par value, it is contended that uniformity requires the computation of the tax upon the record value of no-par-value stock as well. The defect of this argument is that by section 32 of the act the board of directors of a corporation may be authorized to sell no-par-value stock for such consideration [fol. 60] as "from time to time may be fixed by the board of directors pursuant to authority conferred in such certificate," while paragraph 6 of section 4 requires the statement of incorporation to give the par value of all authorized par-value stock. The franchise tax is based

upon authorized capital stock, and the reports required by section 28 do not aid in obtaining a specific money value for all authorized but unissued no-par-value stock. Such no-par-value stock as is authorized but as yet has no sale value fixed by the board of directors will escape unless a value is attributed to it by law for the computation of the tax, while all authorized but unissued par value stock will be taxable. There is a record of the value of authorized stock of par value; there is no record value required of all authorized stock of no par value. There is thus a clear distinction between the two classes of authorized shares. The tax "must be uniform as to the class upon which it operates." A fixed rule of value for the computation of the franchise tax may be supported with reference to no-par-value shares if there is a sufficient distinction between corporations without no-par-value stock and corporations with no-par-value stock.

In Stewart v. Brady, 300 Ill. 425, we said with respect to the legislative power of classification: "Its classification of the objects of legislation is not required to be scientific, logical or consistent if it is reasonably adapted to secure the purpose for which it is intended and is not purely arbitrary. Legislative classification does not have to be so broad and comprehensive as to include all the evils which might by possibility be brought within its terms. Classification must be accommodated to the problems of legislation and must be palpably arbitrary to authorize a judicial review of it. It cannot be disturbed by the courts unless they can see clearly that there is no fair reason for the law that would not require with equal force its extension to others whom it leaves untouched." We further said at page 436 of the same case: "One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis but is essentially arbitrary. A distinction in legislation is not arbitrary if any state of facts reasonably can be conceived that would sustain it, and the existence of that state of facts at the time the law was enacted must be assumed. (Lindsley v. Natural Carbonic Gas Co. 220 U. S. 61.) It makes no difference that the facts may be disputed or their effect opposed by argument and opinion of serious strength."

[fol. 61] Before 1919 no-par-value stock was not authorized by the laws of Illinois. The act of 1919 authorized the use of such stock, and the amendment of 1923 says that shares of no-par-value stock shall be considered of the value of $100 for the purpose of computing the annual franchise tax. There is a sufficient difference between par-value stock and no-par-value stock to authorize this definite basis of valuation in computing the franchise tax of corporations authorized to issue no-par-value stock. The General Assembly has said substantially that corporations desiring to use no-par-value stock shall make that stock of such value, in actuality, as to bear a franchise tax computed upon a $100 valuation, or if the stock is not of such value, that the corporation shall bear this tax as one of the burdens of exercising the privilege conferred by law of using no-par-value stock. This is little different, in principle, from saying, as section 32 of the general Corporation act says, that

no-par-value stock shall not be sold for less than $5 nor more than $100 per share. The rules of valuation laid down in the general Corporation act as amended in 1923 are proper as applied to the no-par-value stock of corporations using such stock and apply uniformly to all no-par-value stock. This classification is reasonable and proper. Moreover, it is substantially necessary to the determination of fees and franchise taxes.

We regard the view here taken as supported by the opinion in American Uniform Co. vs. Commonwealth, 237 Mass. 42, although that case was based in large part upon the right of the State to admit or refuse admission to a foreign corporation. In that case the court said: "Corporations with capital stock of a par value afford an easy measure for the computation of the excise. There is no such ready-at-hand measure for the computation of the excise upon corporations having capital stock without par value. Some excise must be exacted from them in fairness to other foreign corporations. The latter would have just ground for complaint if they were exempted altogether. It cannot be deemed oppressive to enact a general rule as to all such corporations that the excise shall be measured by the par value which most frequently prevails in corporations whose stock has a par value." Although the issues were not the same, some of the language in Detroit Mortgage Corp v. Secretary of State, 211 Mich. 320, also supports the view we have here taken.

We do not regard the case of People v. Mensching, 187 N. Y. 8, [fol. 62] as authority upon the point here in issue. That case involved a stock transfer tax, and as construed by the court, each share of stock was taxed at a fixed sum, regardless of its face value. That case decides merely that stocks of different face values may not be taxed at the same amount. It dealt with stocks whose values could readily be determined to be different. The issue here is as to a distinction between shares of stock having a par value and shares of stock having no par value.

People v. Walsh, 195 N. Y. Supp. 184, 202 App. Div. 651, is not necessarily opposed to the view we take in this case. It is true that the Walsh case held unconstitutional a New York statute valuing no-par-value stock at $100 per share for purposes of taxation, but the New York tax was based upon capital issued, and the value of such capital is determinable whether represented by par-value stock or no-par-value stock. The Illinois tax is based on authorized capital stock, and the issue here presented was not involved in the New York case. To impose the Illinois tax there must be a basis for valuing all authorized stock, whether issued or unissued, whether of par value or of no par value. The New York case in no way presented an issue regarding authorized stock whose value may have been subject to future determination.

We do not find that the basis for computing the franchise tax on no-par-value stock impairs the obligation of contracts, deprives of property without due process of law or denies the equal protection of the laws.

The judgment is affirmed.

Judgment affirmed.

Mr. Justice Thompson, dissenting:

The construction given the general Corporation act by the decision of the court nullifies many of its provisions. By holding that the "amount of authorized capital stock" need not be stated in dollars it ignores the plain language of the statute and opens the door to fraud.

Section 4 of the act requires that the statement of incorporation set forth, among other things: "(8) The total amount of authorized capital stock;" "(6) the number of shares into which the capital stock is to be divided, whether all or part of the same shall have a par value, and if so, the par value thereof, which shall not be less than $5, nor more than $100, per share, and whether all or part of the same shall have no par value;" "(9) the amount of such stock which it is proposed to issue at once (which shall not be less than [fol. 62½] $1000, all of which must be subscribed);" and "(10) the payment of at least one-half of the capital stock, which it is proposed to issue at once."

The term "capital stock," properly speaking, signifies the amount fixed by the corporate charter to be subscribed and paid in by the shareholders of a corporation. It is the property of the corporation contributed by its shareholders to the extent required by its charter. While the capital or assets of a corporation may be increased by accumulation of profits or enhancement in the value of property or reduced by losses or decrease in values, the amount of the capital stock remains fixed unless it is increased or reduced by or under legislative authority. (Armstrong v. Emmerson, 300 Ill. 54.) "The amount of authorized capital stock means the total sum of money necessary to be paid into the treasury of the corporation to secure the issuance of the total number of shares of stock authorized by the articles of incorporation." (People v. Emmerson, 305 Ill. 348.) This is true whether the shares issued state a par value or state no par value. The capital stock is divided into a certain number of shares, each share being the interest the owner or stockholder has in the management of the corporation and in its surplus profits, and, on a dissolution, in all its assets remaining after the payment of its debts. The corporation issues to each stockholder a stock certificate, which is a written acknowledgment of the interest of the stockholder in the corporate property. This certificate of stock is not the stock itself. It is mere evidence of the holder's ownership of the stock and of his rights as a stockholder to the extent specified therein. (5 Fletcher's Cyc. Corp. sec. 3425.) If the stock has a stated par value that par value must be expressed in the certificate, but if the stock is of that variety known as stock having no par value, then the dollar-mark does not appear upon the certificate. In either event the stock has, in fact, a par value,—i. e., a value equal to the fractional part of the authorized whole represented by it. In the one variety it is expressed on the certificate; in the other it is not. Whatever the character of the certificate issued, each share represents an aliquot part of the total assets of the corporation, regardless of what its nominal or its actual value may be. Rarely, if ever, is the

actual value of a share of stock the same as its nominal value. Practical experience shows that it is impossible to maintain a constant equilibrium between the nominal capital of a corporation and its assets. The par value of a share of stock, whatever the character of [fol. 63] the certificate issued to the shareholder, is the fractional part of the share capital, represented by a particular variety of stock, produced by dividing the total amount authorized by the number of shares into which such variety is divided. For example, the par value of the no-par-value stock of appellant is 1/10,000th of $50,000, or $5.

That the act requires the amount of the authorized capital stock to be stated in dollars is evidenced by the fact that the legislature has said that the amount which is proposed to be issued at once shall not be less than $1,000. It does not say the minimum may be 200 shares of no-par-value stock. When the legislature fixed the amount it fixed it in dollars. How is the Secretary of State to know when one-half of the amount of capital stock, which it is proposed to issue at once, has been paid, if the amount is not stated in dollars? I know of no way to pay "one-half of the capital stock" except to pay it in dollars or their equivalent. Section 23 makes directors liable for assenting to an indebtedness in excess of the amount paid in on the shares of capital stock of the corporation issued and outstanding and for declaring a dividend which will impair the capital. Section 28 requires at least one-half of the amount of an increase in capital stock which is issued, to be paid in before the new stock is issued. If the increase in capital stock is merely a certain number of shares of stock of no par value without the amount of the increase being stated in dollars, when is one-half of the amount of the new issue paid into the treasury of the corporation and when does the new issue become lawful? Section 53 makes each stockholder liable to creditors to the extent of any unpaid portion of the shares issued to him. If shares may be issued by the corporation without regard to their par value, how is the "unpaid portion" to be determined? These sections, and many more, are a nullity unless the amount of the capital stock of a corporation must be stated in dollars.

Whether the shares of stock have a stated par value or have no par value stated, the corporation cannot issue the stock for less than par. In order to secure the issue of all the shares of stock there must be paid into the treasury of the corporation, in cash or its equivalent, the total amount of its authorized capital stock. Under section 32 the corporation is authorized to sell its shares of stock having no par value for such consideration, not less than $5 nor more than $100 [fol. 63½] a share, as may be prescribed in the certificate of incorporation or as from time to time may be fixed by the board of directors pursuant to authority conferred in its certificate, but the price fixed could under no circumstances be less than par. If the total amount of authorized capital stock of a corporation be $10,000, divided into 1,000 shares of no par value, the minimum price for each share must be $10. The board of directors may likewise fix the price at which par-value shares may be sold by the corporation so long as it does not sell them for less than par. Section 30

requires each certificate for shares of capital stock to have stamped or printed on it the amount actually received by the corporation for the shares represented by it. There is nothing in the act to indicate that the legislature meant to exempt from these general sections, corporations issuing shares stating no par value.

Section 1 of article 9 of the constitution gives the General Assembly power to tax corporations owning or using franchises and privileges in such manner as it shall from time to time direct by general law, uniform as to the class upon which it operates. The legislature may classify corporations for taxation, (Coal Run Coal Co. v. Finlen, 124 Ill. 666,) but the classification must have some reasonable relation to the end proposed by the particular legislation. (Springfield Gas Co. v. City of Springfield, 292 Ill. 236; Commonwealth v. Alden Coal Co. 251 Pa. 134, 96 Atl. 246; State v. Minnesota Farmers' Mutual Ins. Co. (Minn.) 176 N. W. 756; Hayes v. Smith, (Mont.) 192 Pac. 615.) Corporations may be classified as banking, railroad, mining, insurance and manufacturing, because each of these classes has characteristics which differentiate it in important particulars from the others. But there is no reasonable basis for placing corporations issuing their stock with a par value in a class different from those corporations issuing no-par-value stock. Take, for instance, two companies manufacturing the same article by the same process and each of which has an authorized capital stock of $100,000 divided into 20,000 shares. What possible difference can it make if one of these corporations issues certificates stating a par value of $5 while the other issues certificates which state no par value? The actual par value of the shares in both corporations is exactly the same, and so, also, is the liability of the directors and the stockholders to creditors and the rights of the shareholders to participate in the business of the corporation. But under the amendment added in 1923 to section 105 the corporation issuing [fol. 64] certificates expressing no par value must pay an annual franchise tax twenty times as large as the corporation issuing certificates expressing a par value. This is a discrimination which finds no basis in authority or in reason. Whether stock be par value or no par value, it merely represents the proportionate interest of the holder in the corporate assets, (8 Thompson on Corp.—2d ed.—sec 3447a,) and the burdens of taxation must fall equally upon all corporations of a given character without regard to whether their stock is of the one kind or the other. The amendment is unconstitutional and void.

Mr. Justice De Young took no part in this decision.

[fols. 65-67] IN SUPREME COURT OF ILLINOIS

JUDGMENT—June 17, 1924

And now, on this day, this cause having been argued by counsel, and the Court, having diligently examined and inspected as well the

record and proceedings aforesaid, as the matters and things therein assigned for error, and now, being sufficiently advised of and concerning the premises for that it appears to the Court now here, that neither in the record and proceedings aforesaid, nor in the rendition of the Judgment aforesaid, is there anything erroneous, vicious or defective, and in that record there is no error;

Therefore, it is considered by the Court that the Judgment of the Circuit Court aforesaid, be affirmed in all things and stand in full force and effect, notwithstanding the said matter and things therein assigned for error. And it is further considered by the Court that the said Appellee recover of and from the said Appellant costs by him in this behalf expended, to be taxed, and that he have execution therefor.

[fol. 67-1] IN SUPREME COURT OF ILLINOIS

[Title omitted]

PETITION FOR REHEARING—Filed July 10, 1924

And now comes Roberts & Schaefer Company, a corporation, appellant herein, and hereby makes application for a rehearing in the above entitled cause and in support thereof shows that in rendering its decision herein the court has overlooked or misapprehended certain material points and authorities applicable to said cause.

Appellant's contentions in this cause were

(1) That the total amount of the authorized capital stock must be stated in a sum of money under the requirements of Section 4 (8) of the General Corporation Act and that the tax is required to be computed upon that sum or amount by Section 105 of the act. Appellant relied on the previous decisions of this court on the meaning [fol. 67-2] given to those words in a long line of decisions and especially in the Armstrong case, 300 Ill. 54, and People ex rel. Roberts & Schefer v. Emmerson, 305 Ill. 348. (Brief of Appellant, pp. 5 and 6.) The court adopted this as its view in its opinion filed in this case on February 19, 1924.

(2) Appellant further contended that this being the law, the amendment of 1923 was unconstitutional because it imposed a rate of taxation not uniform as to the class to which it applies, as provided in our State Constitution, and denied to persons within the jurisdiction equal protection of the law, as required by the 14th Amendment of the Federal Constitution. (Brief of Appellant, pp. 6 to 17.)

(3) Appellant further contended that the number or kinds of shares into which the total authorized capital stock was divided, as required by Section 4 (6) of the act, was immaterial and inconsequential for the purpose of determining the amount of the authorized capital stock and for the purpose of computing the tax thereon, and

that therefore there was no distinction based on any real or substantial difference between corporations using par value and those using no par value certificates to evidence shares of their authorized capital stock and that such difference as existed bore no relation to the object sought, which was to raise revenue by a tax upon corporations having an authorized capital stock. (Brief of Appellant, pp. 21 to 27.)

1. Appellee contended that Section 4 (8) of the act does not require the total authorized capital stock to be stated in a sum of money in the charter but only the total number of shares of each kind, whether such shares were to be evidenced by certificates showing a par value per share or certificates showing no par value per share, but only the amount paid in. Appellee relied mainly on the fact that [fol. 67-3] Section 4 (6) of the act permitted the use of shares of no par value and claimed that no total amount of authorized capital stock need be stated in such case, and upon the fact that the sale price of shares evidenced by no par value certificates was permitted by the act to be fixed by the Board of Directors at a date subsequent to the issuance of the charter. (Appellee's Brief, pp. 9 to 12.)

2. Appellee further contended that since no stated amount of authorized capital stock was required to be stated in the charter in a sum of money, therefore Section 105 could not be enforced against corporations, all or a part of whose authorized shares was proposed to be evidenced by certificates showing no par value. (Appellee's Brief, pp. 13 and 14.)

3. Appellee further contended that this situation created a necessity for fixing an arbitrary valuation per share upon the shares of corporations all or part of whose shares were proposed to be evidenced by certificates stating no par value. This necessity appellee contends arises from the fact that the tax cannot be assessed without the arbitrary valuation clause inserted by the amendment of 1923 and that this very necessity and the difference creating it is sufficient to justify the classification of corporations into par value corporations and no par value corporations. (Appellee's Brief, p. 18.)

If the arbitrary valuation clauses are to be sustained as a valid part of the General Corporation Act it becomes of the utmost importance to accurately determine and define the classes of corporations to which they apply. The court has overlooked the exact wording of these clauses and the necessity for determining the class of corporations to which they may validly apply. These clauses appear- [fol. 67-4] ing at the end of Sections 105 and 107 read as follows:

"In the event that the corporation has stock of no par value its shares for the purpose of fixing such fee shall be considered to be of the par value of one hundred dollars."

The court considers the above language and also similar language appearing in Sections 96 and 101 as an aid in construing Section 4 of the act. The court, however, has overlooked the fact that Section 96, the amendment to Section 105, and Section 107 all begin with

the words "In the event that," and that Section 101 begins with the words "If a foreign corporation." These words clearly indicate that these clauses are to become operative only after Section 4, in the case of domestic corporations, and Sections 80 and 81, in the case of foreign corporations, have been strictly complied with according to the meaning of those sections. All of these clauses quite evidently are not intended by the legislature to have an effect upon the meaning of the requirements fixed in Section 4 and Sections 80 and 81 but are to be superimposed after the corporation has been organized or admitted in accordance with the terms of those sections. This meaning becomes more clear and evident when Section 129 is considered. This section fixes the pro rata amount of the first year's franchise tax to be paid by new corporations, or, upon increased capital stock, by old corporations.

These clauses quite evidently carve out of the general class covered by the sections in which they appear a special class of corporations and impose upon that class special and additional burdens in the matter of taxation. These clauses, therefore, under the usual rules of construction must be strictly construed.

Chestnut v. Hood, 68 Ill. 132.

[fol. 67-5] These clauses coupled with the penal clauses of the act makes them penal in character. They must be strictly construed.

People v. Peacock, 98 Ill. 172.
Siegel v. People, 106 Ill. 89.
State Board v. Ross, 191 Ill. 164, 60 N. E. 811.
Rock Island v. People, 217 Ill. 164, 75 N. E. 368.

The amendment of 1923 was passed four years after Sections 4 and 105 of the act. The most effective means of ascertaining the legislative intent is to consider the new act with reference to the state of the law before its adoption.

Wright v. People, 101 Ill. 126, at 131.

The court has further overlooked the exact language of these clauses and assumed that the language of each of these clauses is identical. The language is identical in the amendment to Section 105 and the last clause of Section 107. It differs, however, in Section 96 and Section 101 in the following respects:

Sections 105 and 107: "In the event that the corporation has stock of no par value."

Section 96: "In the event that the corporation has capital stock of no par value."

Section 101: If a foreign corporation has a capital stock of no par value."

What does the legislature mean by "stock of no par value," in Sections 105 and 107, "capital stock of no par value," in Section 96, and "a capital stock of no par value," in Section 101?

If they are used in the sense which is universally given to them by the decisions of the courts, the clauses in which they appear are

entirely unintelligible. Appellant points out below that "capital stock" or "a capital stock" usually refers to the sum of money paid into the corporation by its shareholders for the prosecution of its [fol. 67-6] proposed business. This meaning, however, is utterly contradictory and cannot be harmonized with the term "capital stock of no par value." To make this term at all intelligible it is necessary to add additional language to this section not placed there by the legislature. This the courts, under the usual rules of construction, will not do. Such addition is designated by the courts as judicial legislation.

Martin v. Swift, 120 Ill. 488, 12 N. E. 201.
Ottawa v. Downey, 127 Ill. 201, 20 N. E. 20.
Chicago v. McDonald, 176 Ill. 404, 52 N. E. 982.
Wunderle v. Wunderle, 144 Ill. 40, 33 N. E. 195 at 199.
Illinois Central v. Chicago, 173 Ill. 471, 50 N. E. 1104 at 1107.
Hydraulic Co. v. Elgin, 191 Ill. 476, 62 N. E. 929 at 932.
Schaefer v. Burnett, 221 Ill. 315, 77 N. E. 546 at 547.
Diedrich v. Rose, 228 Ill. 619, 81 N. E. 1140.
People v. Chicago, 242 Ill. 561, 90 N. E. 259.
Wurlitzer v. Dickinson, 247 Ill. 27, 93 N. E. 133.

If we take these words to mean, as the court inadvertently did, "capital stock issues" we secure a term which is itself as ambiguous as the terms used and receive no aid from the substitution. If, however, we construe the term "capital stock of no par value" to mean "shares of capital stock" evidenced by certificates stating no par value the question then arises as to the corporations included in that class.

If Section 4 is to be so construed as to enlarge the scope of the section to permit the organization of corporations whose charters shall state only that they shall have a certain number of shares of no par value, with no amount of authorized capital stock nor any issue price for such shares stated in the charter, then does the [fol. 67-7] class to which the arbitrary valuation clause applies include only such corporations or does it also include corporations which are authorized by their charters to issue both shares without par value and shares stating a par value? The language used in the statute is "its shares," and this plainly means all of its shares. There is no qualifying or limiting adjective used to restrict the meaning of the word "shares" to shares of no par value. Thus, if a corporation states in its charter that it proposes to have 10,000 shares of the par value of $10 a share and 10,000 shares of no par value and states no amount for its authorized capital stock, all the shares of that corporation are required to be considered at $100 per share and the corporation for the purpose of the franchise tax has an authorized capital stock of $2,000,000. Let us assume the same charter with the additional language, proposing that the 10,000 shares of no par value be issued at once at $10 a share. As appellant understands the decision such a charter does not state the amount of the authorized capital stock in a sum of money and does come

within the class to which the arbitrary valuation clause applies. Applying the arbitrary valuation clause to this corporation it requires that all of its shares be valued at one hundred dollars per share and that it be assessed upon $2,000,000 and not upon $200,000, and its tax will be $1,000 instead of $100. Let us take the same charter and assume that the language states that the total authorized shares shall be 10,000 shares of the par value of $10 a share and 10,000 shares of no par value 5,000 shares of which shall be issued at once at $10 a share and the remaining 5,000 shares shall be issued from time to time at such prices as the Board of Directors may fix, within the statutory limits. A corporation with such a charter, under the opinion of the court, would be placed in the class to which the arbitrary valuation clauses apply and all of its shares, both the [fol. 67-8] par and the no par, must be considered to be of the par value of one hundred dollars each for tax purposes.

The court in its previous opinion of Febraury 19, 1924, construed Section 4 so as to give it a meaning harmonious with the previous decisions of this court and fixed a basis of taxation clear and simple for the purpose of its administration by the Secretary of State and just and equal so far as all corporations are concerned. That decision stabilized the meaning of the important terms "authorized capital stock" and "paid in capital stock" and "shares of capital stock," whether evidence by certificates stating a par value or evidenced by certificates stating no par value.

In view of the importance of the proper construction of the Corporation Act, especially Section 4, the urgent necessity for clarity of expression and proper definition of words, phrases and terms used, and the unusual importance to a great number of Illinois corporations and to foreign corporations licensed to do business in Illinoios, of the final decision in this case, appellant respectfully requests the indulgence of the court for the purpose of setting down and defining certain of these essential words, phrases and terms frequently used in the statute and in the opinion of the court as apparently interchangeable or as meaning one thing in one section and something different in another section. These words, terms or phrases may be tabulated as follows:

(1) "Capital stock."
(2) "Authorized capital stock."
(3) "Authorized stock issues."
(4) "Share of no par value."
(5) "Share of par value."
(6) "Paid in capital stock."
(7) "Capital" or "working capital."
(8) "Capital stock of no par value."
(9) "Sale value of no par shares."
(10) "Money value of no par shares."

[fol. 67-9] The erroneous use and the apparently interchangeable use of various of the foregoing terms and phrases has necessarily led to confusion in definition and construction, and the misapprehension of these terms has, we submit, led the court into error in the present

case. The greatest difficulty has been in the confused and erroneous use of "capital stock of no par value," "sale value of no par stock," "money value of no par stock" and "authorized stock issues." The terms "share of no par value" and "share of par value," when taken in their usual meaning and as used in the statute under a correct construction and definition have a meaning practically identical with the term "fractional parts." This is made clear by the substitution of the words "fractional parts" for the word "shares" in paragraph 3 of Section 4. After such substitution the first clause of that paragraph would read "The number of fractional parts into which the capital stock is to be divided." These terms, "shares" or "fractional parts," are entirely distinct from the term "capital stock" and, of course, from the term "authorized capital stock," and it is highly essential to keep these distinctions clearcut.

The term "capital stock" is a broad general term and should be modified for the sake of clarity by the word "authorized" when speaking of the authorized capital stock and by the words "paid in" when speaking of the part of the total authorized capital stock which has been paid in to the corporation for the issuance of all or part of its shares. All of these terms are also distinct from the accounting terms "capital," "capitalization" and "working capital" (which terms are applied to the actual value of the corporation's assets at any particular time). The capital fluctuates The paid in capital stock and the authorized capital stock remains definite and fixed. All of [fol. 67-10] these terms have one common characteristic and that is that they are necessarily expressed in terms of money.

The capital of a company is the basis of its credit. It is expressed in balance sheets and financial statements in items of money. The term "paid in capital stock" must be stated in terms of money, the amount or sum of money so expressed being the money value equivalent to the currency, securities or other property turned over to or paid into the corporation originally for the issuance of all or part of its authorized shares of stock. The term "authorized capital stock" must also be expressed in terms of money and is the amount of currency or property which the corporation is authorized to have paid into its treasury for the issuance of all of its authorized shares.

Appellant respectfully suggests that the court has misapprehended the legislative intent as to the characteristics of shares of no par value and has given undue force to that term in interpreting the statute. The court's attention is invited to page 22 of appellant's brief, which has been overlooked or misapprehended by the court. The qualities and qualifications of shares of no par value, created by our statute, must be determined from the Illinois statute itself and not from provisions creating similar shares of no par value enacted by other states. These two kinds of shares are by our statute treated and made identical in substance. The difference between them is in the form of the certificate and is slight and inconsequential. Section 4 provides that the par value of shares shall be not less than five dollars nor more than one hundred dollars. The par value of shares must be paid in currency or property to the corporation by the

[fol. 67-11] shareholder in order to satisfy in full the stockholder's liability.

Dee v. Proviso, 280 Ill. 252, 125 N. E. 24.
Farwell v. Great Western, 161 Ill. 522, 44 N. E. 891.
Sprague v. National Bank, 172 Ill. 149, 50 N. E. 19.
Gillett v. Chicago Title Co. 230 Ill. 373, 82 N. E. 891.

The sale value of the par value shares is not fixed or limited any place in the statute and the directors of the corporation by proper action can, of course, fix this sale value per share at any price they see fit. The legal limitations are necessarily that the price cannot be less than par without the creation of a stockholder's liability, and if more than par the excess becomes paid in surplus and not paid in capital stock. Shares of no par value, so far as Section 4 is concerned, could be issued and sold by the board of directors at such prices as could be obtained for same provided that from the sale of all the shares of no par value the total amount of capital stock represented by such shares of no par value were paid into the treasury of the corporation. Where less than the total of the shares of no par value is sold and the question is raised as to whether the shareholder has paid for his shares in full, recourse must be had to the fractional part of the total amount of the authorized capital stock represented by the share or shares of no par value purchased by such shareholder. Section 32 supplements Section 4 (6) by stating the limits at which shares of no par value may be issued and sold by the Board of Directors or incorporators and these limits are made to correspond exactly with the limits fixed in Section 4 (6) for the par value of the shares having a par value. The stockholders' liability [fol. 67-12] is thereby made definite and the par value and no par value shares in this respect are made identical. Section 28 requires report of the issuance and the issue price of both par value and no par value shares and applies to each of these kinds of shares in identically the same manner. Sections 30 and 31 requires that the certificate must state the percentage paid in, and the par value in cases of shares having a par value and the amount paid in on shares having no par value, thus placing the two kinds of stock on practically an identical basis so far as the certificate evidencing them is concerned. Section 32 makes provision for the sale of both kinds of shares of stock upon an installment basis so far as payment is concerned.

The court has misapprehended appellant's contention in this regard. Appellant does not contend that Sections 23, 28, 32 and 33 have a bearing as to fixing the amount of authorized capital stock or a bearing on the construction of Section 4 (8). Appellant does contend that these sections do have a bearing upon determining the qualities and characteristics of shares without nominal or par value provided for in Section 4 (6). Appellant contends that these qualities and characteristics of no par value shares are made by these sections identical with par value shares and that the only difference between them is in the form of the certificates by which they are respectively evidenced. The terms of these respective certificates are dictated by Sections 30 and 31.

The terms "share of par value" and "share of no par value," as we have pointed out, when considered in connection with the fact that they are fractions of a whole, which under any set of circumstances must be expressed in terms of money, must themselves when considered in their reality also represent sums of money and must be [fol. 67-13] expressed in terms of money; this whether they are called "par value" or "no par value" shares. The essential difference so far as there is a difference between these shares is in the form of the certificate by which the shareholder is able to evidence his ownership. These certificates are the muniments of title or evidence of the right which each shareholder has in the net profits and the net assets of the issuing corporation.

A corporation may exist with a capital stock stated in money and divided into shares and the rights of shareholders may be determined and enforced even though no certificates have been issued to the shareholders. 14 Corpus Juris, page 481, Section 710; Corwith v. Culver, 69 Ill. 502; Chandler v. Northern Cross, 18 Ill. 190; Kimmel v. Gray, 196 Ill. 406; Thayer v. Butler, 141 U. S. 234.

The court has overlooked the points in appellant's brief, pp. 4 to 6, where the meaning of the term "authorized capital stock" as used in Section 105 of the act were considered. This tax is upon the proportion of the capital stock authorized by the charter and in the case of appellant is upon the total capital stock authorized by its charter. The record in this case shows that said total amount was $150,000. The Corporation Act required appellant to set forth the total amount of its authorized capital stock in its charter. Clearly Section 105 refers to and must be construed with Section 4 which covers the statements required to be made to secure a charter, which statements become a part of the charter. The meaning of the words "capital stock" has been defined by this court in a long line of decisions before the year 1919, when the no par value share was introduced into the General Corporation Act, and the meaning of those words has been again defined since 1919 in a number of decisions and in all these [fol. 67-14] decisions the definition of those terms was necessary to the decision of the case and was not in the nature of obiter dicta. The cases before 1919 arose mainly under the administration and enforcement of the Revenue Act providing for a tax upon the capital stock of corporations and it became necessary in the enforcement of that statute and the determination of taxes arising thereunder to determine and define what constituted the capital stock of a corporation and to distinguish it from "shares" of capital stock owned by the shareholders. The following language appears in substance in all the cases cited below:

"Capital stock, or that kind of property designated as such, is not the identical lands, chattels and other articles of property possessed by the corporation but, as this court defined it in Porter et al. v. Rockford R. I. & St. L. R. R. Co. 76 Ill. 561, means, as used in the Act of 1872, not shares of stock, either separately or in the aggregate, but one intended to designate the property of the corporation subject to taxation not in separate parts but as a homogeneous unit par-

taking of the nature of personalty and subject to the burdens imposed upon it at the domicile of the owner."

Quincy Bridge Co. v. Adams County, 88 Ill. at 621, see also,
Ottawa Glass Co. v. McCaleb, 81 Ill. 551, at 561.
Danville P. & B. Co. v. Parks, 88 Ill. 173.
Pacific Hotel Co. v. Leid, 83 Ill. 302, at 311.
O. & M. R. R. Co. v. Weber, 90 Ill. 443.
Consolidated Coal Co. v. Miller, 236 Ill. 149.
Cent. Ill. Public Service Co. v. Swartz, 284 Ill. 108, at 111.
Illinois Central v. Carr, 302 Ill 172, at 179.

The former corporation act, in force July 1, 1872, provided in Section 2 that whenever persons desired to form a corporation they should file a sworn statement setting forth the name and object of the [fol. 67-15] proposed corporation, "its capital stock, the number of shares of which such stock shall consist," etc. This court has defined the meaning of "capital stock" as used in the Corporation Act of 1872, as follows:

"The statutory liability is for indebtedness in excess of the amount of the capital stock and not for indebtedness in excess of the value of the capital stock or the assets or property of the corporation. The amount of the capital stock is the amount contributed by the shareholders for the prosecution of the business and the officers and directors may incur indebtedness equal to that amount without assuming personal liability."

Slater v. Taylor, 241 Ill. 102, 89 N. E. 271, at 272.

The essential thing in all of these decisions to note is that the term "capital stock" is shown to be entirely distinct and different from the term "shares of capital stock." The legislature is presumed to know the definitions which this court has placed upon words and phrases. The court having defined these terms by previous decision the legislature is presumed to have used the terms in that meaning.

Kelly v. Trust Co. 190 Ill. 401, 60 N. E. 585.
McGann v. People, 194 Ill. 526, 62 N. E. 941.
Kirby v. Runals, 140 Ill. 289, 29 N. E. 697.
Fitzpatrick v. Bridge Co. 139 Ill. 248, 28 N. E. 837.

The legislature directs in Section 156 of the act that "the provisions of this act, so far as they are the same as those of existing statutes, shall be construed as a continuation thereof, and not as a new enactment." The provision in Section 4 (8) is the same as the provision of the Corporation Act existing at the time the present act was [fol. 67-16] passed. Both acts required incorporators to state under oath the capital stock proposed, and this statement becomes part of the charter.

Appellant suggests that the court has overlooked the fact that the construction placed upon Section 4 in effect strikes out of said Section the entire Clause 8 and in effect rewrites Clause 9 so as to read:

"The amount of such stock which is proposed to be issued at once (which shall not be less than One Thousand Dollars in par value stock nor less than the number of shares of no par value at a declared issue price aggregating One Thousand Dollars, all of which must be subscribed)."

The court, in its opinion in support of its construction of Section 4, speaks of the sale value of no par value shares throughout and proceeds upon the misapprehension that the number of shares of stock of par or no par value is all that is required to be stated in the charter of the corporation and that to determine the total amount of the authorized capital stock it is necessary to multiply the number of par value shares by the par, the number of no par value shares by the sale value or issue price, and add the result of the two multiplications together and thus arrive at the total amount of the authorized capital stock. This misapprehension is fundamental in arriving at the decision at which the court arrived in this cause. It is quite plain that a sum or amount may be set and determined and then divided into parts just as readily and certainly as the parts may be given from which the whole may be constructed and determined.

Incorporators always determine the par value or money value of par shares, both the aggregate sum and the sum per share, before the sale value is determined. Incorporators can as readily determine and set down the money value of the aggregate number of no par [fol. 67-17] value shares as they can for the par value shares. The aggregate sum is the important thing and when determined is the sum on which the tax is levied. The sum per share is unimportant for the purposes of the tax where the aggregate is determined and set down. Moreover, the court later in its opinion states that the incorporators may if they so elect set down the value per share of no par shares in the charter and this is clearly correct. Section 32 is a limitation upon the authority of the board of directors and not a grant of power to them. Taking said second paragraph in its context in Section 32 and considering it from that point of view it is quite clear that the intent of the legislature was to provide a method in addition to the provision in Section 4 whereby the stockholders' liability for unpaid parts of the purchase price might be determined, and to provide a basis for the sale of no par shares on installment payments as therein authorized for all kinds and classes of shares.

Appellant suggests that the court has overlooked the fact that Section 4 is perfectly clear in itself and it is unnecessary for the purpose of construing that Section, especially in connection with determining its meaning so far as the franchise tax provided in Section 105 is concerned, to consider Section 32 at all. (Appellant's Brief, pp. 4 and 5.)

However, even when construed with Section 4, Section 32 does not in any way modify or detract from the full force and effect of paragraph 8 of Section 4 as heretofore construed by this court in Armstrong v. Emmerson and People ex rel. v. Emmerson. This clearly appears when the language in Section 32 is transposed into Section 4 (6).

Transposing said language that paragraph would read as follows:

"This Statement of Incorporation shall set forth—
[fol. 67-18] (6) The number of shares into which the capital stock is to be divided, whether all or part of the same shall have a par value and if so the par value thereof, which shall not be less than five dollars nor more than one hundred dollars per share, and whether all or part of the same shall have no par value, in which event the corporation may issue and sell its shares of stock having no par value from time to time for such consideration not less than five dollars nor more than one hundred dollars per share, as may be prescribed in the certificate of incorporation, or as from time to time may be fixed by the board of directors, pursuant to authority conferred in such certificate, and if there is to be more than one class of stock created a description of the different classes, the number of shares in each class and the relative rights, interests and privileges each class shall represent.
(8) The total amount of the authorized capital stock."

Had Section 4 been drafted to read as above set forth so far as paragraphs 6 and 8 are concerned, it seems clear that compliance can be made with Section 8 only by determining in advance the total sum of money which the corporation expects to receive and proposes to obtain as paid in capital at some time during its corporate existence by the sale of shares of said authorized capital stock. We submit that the court has overlooked the fact that the construction placed upon Section 4 disregards and strikes out entirely the language of paragraph 8 of that Section. The opinion concerns itself only with the language of Section 4 (6) as above reconstructed.

The court has also overlooked the fact that said construction strikes from paragraph 6 the initial clause reading:

"the number of shares into which the capital stock is to be divided, whether all or part of the same shall have a par value and if so the par value thereof, which shall not be less than five dollars nor more [fol. 67-19] than one hundred dollars a share, and whether all or part shall have no par value."

and inserts in its place by construction the following language:

"the number of shares of par value and the par value thereof, which shall not be less than five dollars nor more than one hundred dollars, and the number of shares of no par value."

The court, in placing this construction upon the act, in its opinion, overrules its former decision in Armstrong v. Emmerson, 300 Ill. 54, and People v. Emmerson, 305 Ill. 348. The court overlooked the fact that both of these decisions construed and defined the meaning of paragraph 8 of Section 4 after the no-par feature had been introduced into the act and in cases in which, especially in the latter, the very question as to the effect and meaning of no par value stock, representing part of the total amount of the authorized capital stock, was in question and necessary to the decision of the case.

The principle of stare decisis is an important one, especially in this age of multitudinous decisions on constructions of law by the

numerous jurisdictions in the United States and should be departed from only where the previous decisions were flagrantly wrong and mischievous in their effect. These previous decisions which are overruled are neither incorrect nor mischievous in their effect. They define the language "total amount of authorized capital stock" in a manner which meets the definitions of those terms in the minds of all the legal profession, in the minds of business men and accountants and in the minds of investors and creditors.

As stated in appellant's reply to the petition for rehearing filed by appellee the arguments of the lawyers of the country, who advocated the use of certificates, in which no par value was stated, to [fol. 67-20] evidence shares of capital stock, were based fundamentally upon the fact that such certificates more exactly set forth and described the actual facts with reference to the share in the whole of the corporation's net assets and net profits than did certificates expressing a definite sum of money as to par value. These proponents argue that the certificate expressing no par made no misrepresentation even to the most unwary and most ignorant, while the certificate expressing a par value often led the unwary or the ignorant to believe that the corporation had in its treasury or in its possession assets from which it could at any time liquidate and pay the par value or face value of the certificate. The very ignorant were often led to believe that the certificate of stock was a promise to pay the amount designated therein as the par value. Those who have opposed the creation and use of the certificate expressing no par value to evidence and make visible the shares represented in the total assets of the corporation have argued against its use largely on the ground that it destroyed the trust fund doctrine built up through the years by the decisions of the courts and the enactment of statutory regulations, and left corporate creditors and investors without the safeguards which were around and built up on the fact that a definitely determinable sum of money or money value had been required to be paid into the corporate treasury to pay in full for shares of stock. Thompson on Corporations, 1922 Cum. Supp. 618-629, Morawetz on Shares of No Par Value, 26 Harv. Law Rev. 730, C. W. Wickersham on No Par Value, Stock, Harvard Law Review of February, 1924, at page 47; Hollen & Tuthill, Uses of Stock Having No Par Value, Am. Bar Ass'n. Journal of November, 1921. Our Corporation Law as it has been construed in the past by this court, both before and since the no par value stock certificate [fol. 67-21] had been introduced, guards devotedly this trust fund doctrine. The General Corporation Act as construed in the Armstrong case and the People ex rel. Roberts & Schaefer case preserves these safeguards. The act so construed is a happy reconciliation of the opposing schools of legal thought. It requires an accurate statement of fact in the certificate evidencing no par value shares and at the same time eliminates the opportunity to deceive or defraud creditors or investors of the company. The decisions of this court heretofore rendered have guarded with fidelity the rights and interests of all concerned and at the same time provided a construction for taxation purposes which bears equally upon all corporations

in the class, without a hardship upon those which have lawfully availed themselves of the right to evidence the shares in their capital stock by certificates bearing no statement as to a par value but stating only the exact facts.

The court has overlooked appellant's point set forth on pages 7 to 21 of its brief. Appellant there contended that the amendment to Section 105, enacted in 1923, when attempted to be applied for the purpose of fixing appellant's annual franchies tax was void because it impairs the obligation of contracts and takes property without due process. It pointed out that this amendment was made to apply to corporations organized or admitted prior to the enactment of that amendment as well as those subsequently organized or admitted. It may be conceded that the legislature intended to make the arbitrary valuation a condition attached to the right to issue shares evidenced by certificates stating no par value. The court, however, has overlooked the fact that the arbitrary valuation clauses of the act as originally passed affected only the initial fees provided in Sections 96 and 101 and the minimum fee provided in Section 107. No arbi-[fol. 67-22] trary valuation for the purpose of the annual tax was attached as a condition by the legislature for the use of no par value shares by appellant at the time it elected to use that kind of shares, on or before July 1, 1921. The charter granted to this company by the State of Illinois is a contract as well as a property right. American Can Co. v. Emmerson, 288 Ill. 289, 123 N. E. 581. The state imposes a tax upon this right under its revenue act and also upon the exercise of the right under the act in question. By its amendment of 1923 the legislature seeks to invalidate this right by imposing additional conditions. It repudiates its contract contained in the charter by imposing a tax so onerous that the necessary result must be an abandonment of the right granted appellant to divide its capital stock into shares of no par value.

The court has overlooked the fact that since the passage of the General Corporation Act in 1919, in which provision was made for the issuance of shares of no par value, this court has been called upon to construe the meaning of "total amount of authorized capital stock" in four cases. The first of these cases on which two others depend is the case of Armstrong v. Emmerson, 300 Ill. 54, 132 N. E. 768. In that decision this court states:

"The decision of the question requires the determination of the meaning of 'authorized capital stock' in Section 105 of the General Corporation Act. The appellant contends that the language refers to the total amount of capital stock authorized by the Articles of Incorporation; the appellees, that it refers to the amount of capital stock which the corporation has been authorized to issue under the regulations of the Public Utilities Commission in accordance with Sections 20 and 21 of the Public Utilities Act. * * * 'Capital stock' is the sum fixed by the corporate charter as the amount paid in or to be paid in by the stockholders in the prosecution of the busi-[fol. 67-23] ness of the corporation and for the benefit of creditors. * * * At common law the capital stock does not vary but remains fixed, although the actual property of the corporation may

fluctuate widely in value and may be diminished by losses or increased by gains. It is this invariable sum fixed by the charter as the amount to be paid in by the stockholders for the prosecution of the business of the corporation and for the benefit of the corporate creditors which is ordinarily understood by the term 'capital stock' unless the context indicates a different meaning."

In the case of People ex rel. Roberts & Schaefer Co. v. Emmerson, 305 Ill. 348, 137 N. E. 202, this court had before it and construed the charter of this corporation and also Section 4 and Section 105 of the Corporation Act, and the court in its opinion stated:

"The amount of authorized capital stock means the total sum of money necessary to be paid into the treasury of the corporation to secure the issuance of the total number of shares of stock authorized by the Articles of Incorporation."

The court in that decision considered and set forth and construed Section 4, paragraphs 6 and 8, Section 30 and Section 32. Those parts of the statute were set forth in haec verba and immediately following the court states:

"From these sections it is clear that a corporation organized and doing business in this State is required to have an authorized capital stock and the incorporators are required to state under penalty of perjury the total amount of the authorized capital stock, whether the several shares shall have a par value or not. The number of shares into which the capital stock is to be divided must be stated and the amount the corporation actually receives for each share, which in cases of shares of no par value shall not be less than five dollars nor more than one hundred dollars, must be stamped or printed on each certificate."

[fol. 67-24] This court made clear in that decision that this sum of money must be stated, whether the several shares shall have a par value or not. Appellant submits that these last two opinions are in line with the previous decisions of this court and that the legislature's subsequent enactment of an amendment to Section 105, without changing or re-defining the language of Section 4 of the General Corporation Act after its meaning had been so forcibly and clearly stated by this court, must under the usual rules of construction be taken to mean that the legislature accepted those words as defined by the court.

Appellant pointed out in its principal brief (pp. 6 to 9) that the effect of the amendment of 1923 was to create innumerable classes of corporations, depending upon the number of shares of no par value to which the total authorized capital stock stated in the charter was divided. We believe that the court in its opinion overlooked this point. We believe that the court misapprehended the meaning of Section 4 when it stated that "the Statement of Incorporation may specify one or more of three types of authorized stock issues: (1) par value stock whose par value must appear in the statement, (2) no par value stock upon which a value is prescribed in the Certificate of Incorporation, (3) no par value stock whose value 'from time to

time may be fixed by the Board of Directors pursuant to authorized conferred in such certificate.'" It is apparent from this statement that the court has overlooked the fact that Section 4 requires not only the statement of the authorized number of par value and no par value shares but also the total amount of the authorized capital stock. The court in above statement uses the word "stock" or "stock issues" in the sense of "shares of capital stock" and entirely eliminates from consideration paragraph 8 from Section 4 of the act.
[fol. 67-25] The court in its opinion immediately following the above quoted language states:

"Apparently the value specified in the Statement of Incorporation for the second class of stock just mentioned may so far as such stock is unsold be subsequently altered by the Board of Directors if the certificate of incorporation confers such authority."

Appellant suggests that the court overlooked the fact that to enable the directors to alter the price fixed in the charter for no par value shares it would be necessary for the charter to state two inconsistent and inharmonious things. Such a charter would state that each of the authorized number of shares of no par value should be issued and sold at, say, five dollars a share but that the Board of Directors shall have power to issue and sell those shares at not less than five dollars nor more than one hundred dollars. If incorporators fix a price per share in the charter and at the same time confer authority upon the directors to fix a different price per share it would render entirely futile the statement of a price per share in the charter itself. It is, we submit, an entirely different thing to fix a sum of money as the amount of the authorized capital stock.

The language last above quoted is of decisive force in the decision of the case at bar. The charter of appellant states the total amount of the authorized capital stock and states the total number of shares of par and the total number of shares of no par authorized and states that the no par stock shall be issued at once at $5 a share. If the court eliminates from appellant's charter the statement of the total amount of authorized capital stock the question then arises whether appellant's charter brings it within the class to which the arbitrary valuation clauses apply. The court, by the conclusion reached in [fol. 67-26] its decision, holds that it does come within that class. Above quoted language, as we have shown, is based upon a misapprehension as to the possibilities permissible under Section 4. The charter cannot state the issue price and at the same time authorize the Board of Directors to state a different issue price.

The corporation can, of course, by later amendment of its charter, change the issue price either in the charter itself or by authorizing the Board of Directors to issue at a different price, but such amendment changes the charter. The change, however, is not effective until made and the tax in the meantime is based upon the charter as it exists. A charter authorizing only par value shares might be changed by amendment to no par shares but in the meantime it is taxed in the class of corporations having only par value shares. Appellant points out above that under the reasoning and argument

of appellee and the reasoning in the court's opinion the arbitrary valuation clauses can logically apply only to corporations having shares of no par value exclusively. If the reasoning can be extended at all beyond that class it certainly cannot be extended so as to properly include a corporation having a charter reading as appellant's charter does read.

That charter states clearly and exactly all the facts from which the total amount of authorized capital stock may be determined as well as that amount. There is no necessity in the case of appellant for resorting to an arbitrary or fictitious valuation per share of its par value or no par value stock in order to determine and fix the franchise tax.

If the arbitrary clauses are to be sustained as a proper classification by reason of the necessity of fixing a method of valuing shares of no par value, where the charter fixes no such valuation, it follows that the classification must end where the necessity justifying it ends. [fol. 67-27] Even under the reasoning in the court's opinion the appellant was entitled to a decision in its favor since it does not come within the class created by the arbitrary valuation clauses and to which those clauses might be constitutionally applied under the construction given by the court to Sections 4 and 105 of the Corporation Act.

The court in its opinion states that the "certificate of incorporation must almost of necessity fix a sale value upon no par value stock that is proposed to be issued at once." The court has overlooked the fact that this is exactly the case in appellant's charter. The amendment stated that the increased number of shares, being 10,000 shares of no par value, was to be issued at once and paid for by the transference from the surplus account of the corporation to the capital account of the sum of $50,000. This, appellant submits, decisively shows that the court has overlooked and misapprehended the meaning of appellant's charter even in the term of its own decision. Appellant submits that corporations which state in their charter the issue price per share of all their authorized no par value shares, are under the reasoning of the court's decision outside of the class to which the arbitrary valuation clause applies, so long as the charter remains unamended or unchanged.

Appellant further submits that where the charter states the issue price per share of no par value shares and also states that they are to be issued at once at that price, such a corporation comes outside of the class to which the arbitrary valuation clause applies under the decision of this court. Appellant's charter actually comes within the latter group and the record definitely so shows.

The court had before it the charter of this company in the case of [fol. 67-28] People v. Emmerson, 305 Ill. 348, and in that case stated, in reference to the provisions of the charter:

"A certificate of increase of capital stock was duly filed with the Secretary of State showing that the amount of increased capital stock which it was proposed to issue at once was 10,000 shares of common stock having no par value, which was of the value of $50,000, that

all this increased capital stock was to be issued at once for property and that the property for which the stock was to be issued was '$50,000 * * * to be transferred from the surplus account of the company to the capital account, in full payment of the 10,000 shares of no par value common stock.'"

The abstract of the record, page 2, shows that the following allegation was made in the bill filed by appellant below and was admitted as true by demurrer:

"That a certificate of said amendments was duly filed in the office of the Secretary of State on July 1, 1921, and said amendments have been in full force and effect from July 1, 1921, to the present time, and fully set forth that $150,000, consisting of 1,000 shares of preferred of the par value of $100 per share and 10,000 shares of no par value common stock, which is fully paid up at $5 per share, constitutes all the capital stock authorized by complainant's charter."

The court in its opinion further states:

"The money value of authorized stock issues of both the second and third classes may therefore not be capable of determination until a subsequent action of the board of directors although the certificate of incorporation must almost of necessity fix a sale value upon no par value stock which is proposed to be issued at once. The tax is based on the money valuation of authorized capital stock."

Appellant respectfully submits that the clause "The money valuation of authorized stock issues" is not the same as "the money valuation of authorized capital stock." The court by using the term "stock issues" in the meaning of shares has blended together and ob- [fol. 67-29] literated the distinction between two entirely separate and distinct terms. These terms are "capital stock" and "shares of capital stock." The court quite rightly states in the opinion that the tax is based upon the money valuation of the authorized capital stock, but it would be obviously incorrect to state that the tax was upon the money valuation of the authorized shares of capital stock. Nothing in the statute justifies any such construction.

The court further in its opinion states:

"No pecuniary standard for measuring the value of such authorized stock exists as to the third group specified above and the certificate of incorporation may apparently be so drawn as to permit variations by the board of directors."

It appears from above quoted language that the court is here referring to "authorized shares of stock" by using the term "authorized stock" and is not referring to the total amount of authorized capital stock. This process of blending together these two terms necessarily led to the following misapprehension:

"It is difficult to discover how, under the circumstances, the Act can be construed to require that the Statement of Incorporation place a definite money value upon all shares of no par value stock."

Appellant has above shown that it comes within the second class as defined in the court's opinion and that the arbitrary valuation clauses cannot validly be applied to it. Appellant respectfully suggests that the court has overlooked the fact that even as to the third class defined in the opinion there are certain exceptions to which the arbitrary valuation clauses may not be validly applied. Where a corporate charter states that a certain number of its authorized shares shall be issued at a certain price per share the necessity for the arbitrary valuation clauses vanishes as to that number of shares and said clauses cannot validly be used as to them. The arbitrary valu- [fol. 67-30] ation clauses may logically be applied only to the remaining number of authorized shares. If the number of shares at the value or par fixed by the charter is to be used and from them the amount of authorized capital stock is to be constructed, this method of assessment must itself be uniformly applied under the mandate of the Constitution.

We respectfully submit that if paragraph 8 of Section 4 is retained in the act and given its proper force and effect then the arbitrary valuation clauses are necessarily unconstitutional and void; that if this paragraph be eliminated from the act so as to sustain the arbitrary valuation clauses, then those clauses must be carefully and strictly construed; that the classes to which said clauses may validly be applied are limited by the necessity for an arbitrary valuation of authorized shares; that this necessity ends where the charter of the corporation in fact sets forth:

(1) a sum of money as the total authorized capital stock and divides the same into no par shares,

(2) a definite issue price per share for all no par shares, whether they are proposed to be issued at once or not, so long as said issue price remains unchanged by charter amendment,

(3) a definite issue price per share for part of the no par shares to the extent of the number of shares of a determined issue price.

We respectfully submit that the court has overlooked the fact that no necessity exists for an arbitrary valuation of its no par shares; that a definite issue price is fixed as to all of such shares in its charter; that its charter and its annual report show that its no par shares were proposed to be and were issued at once at the price fixed by the charter; that since no necessity exists in appellant's case there is no basis for the legislative classification, including in the class charters [fol 67-31] such as appellant's; that such classification ends with the necessity, or is void if extended beyond the point where necessity supports it.

In view of all of the above and foregoing appellant respectfully submits that a rehearing should be granted in this case.

Johnson, Moran, Paltzer & O'Donnell, Solicitors for Appellant.

[fol. 68] UNITED STATES OF AMERICA:

IN SUPREME COURT OF ILLINOIS

[Title omitted]

ORDER DENYING PETITION FOR REHEARING—Oct. 9, 1924

Now on this day the Court having duly considered petition for rehearing filed herein and the Court being now advised in the premises doth overrule the prayer of the petition and denies a rehearing of this cause.

[fols. 69 & 70] IN SUPREME COURT OF ILLINOIS

CLERK'S CERTIFICATE

I, Charles W. Vail, Clerk of said Court, do hereby Certify that the foregoing is a true, full and complete transcript of the record and proceedings in the case of Roberts & Schaefer Company, a corporation, Appellant, vs. Louis L. Emmerson, as Secretary of State for the State of Illinois, Appellee, and also of the Opinion of the Court rendered therein, as the same now appears of record in my office.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of the said Supreme Court, at Springfield, in said State, this 28th day of October, A. D. 1924.

Chas. W. Vail, Clerk of the Supreme Court. (Seal of the Supreme Court.)

[fol. 71] IN SUPREME COURT ILLINOIS

[Title omitted]

PETITION FOR WRIT OF ERROR—Filed Oct. 22, 1924

To the Honorable Warren M. Duncan, Chief Justice of the Supreme Court of the State of Illinois:

And now comes the appellant, the Roberts & Schaefer Company, a corporation, and represents that on the 9th day of October, 1924, a final judgment was entered by the Supreme Court of the State of Illinois affirming the decree entered by the Circuit Court of Sangamon County in a suit in equity wherein the Roberts & Schaefer Company, a corporation, was complainant and Louis L. Emmerson, as Secretary of State for the State of Illinois, was defendant, and awarding costs in favor of Louis L. Emmerson, as said Secretary of State; that this is an action wherein the relief prayed is that the Secretary of State be required by a mandatory injunction to [fol. 72] accept as and for the franchise tax of the said Roberts &

Schaefer Company for the year beginning July 1, 1923 the sum of money alleged in the Bill to be the proper amount, or in lieu thereof for an injunction restraining the said Louis L. Emmerson, Secretary of State, from issuing a warrant to the Sheriff of Cook County, or any other County, to collect and return the excess franchise taxes demanded for said year.

The Bill alleges that the said Louis L. Emmerson, Secretary of State, had demanded franchise taxes from said Roberts & Schaefer Company for said year computed upon the basis defined in Section 105 as amended and Section 107 of the General Corporation Act of the State of Illinois, said provision in each of said Sections being identical and reading as follows:

"In the event that the corporation has stock of no par value its shares for the purpose of fixing such fee shall be considered to be of the par value of one hundred dollars a share."

The bill further alleged that said clauses of the General Corporation Act were void and of no effect because they and each of them violated and infringed upon the XIV Amendment to the Constitution of the United States.

The Bill further set up the necessary facts to show the proper amount of the franchise tax due from said Roberts & Schaefer Company for said year in the event that said clauses should be held to be unconstitutional and void.

[fol. 73] The said Louis L. Emmerson, as Secretary of State, caused a demurrer to be filed to the Bill in the Court below, whereby he admitted all the material facts and allegations in said Bill. The demurrer was sustained, the complainant below, the Roberts & Schaefer Company, elected to stand by its Bill, and an appeal was taken to the Supreme Court of the State of Illinois. No question of fact was raised by the pleadings, the sole question raised in said cause being the constitutionality of the two clauses of the General Corporation Act above referred to.

Your petitioner avers that in its said Bill of Complaint it expressly charged that the clause above set forth, appearing in both Section 105 as amended and in Section 107 of the General Corporation Act of the State of Illinois, was unconstitutional in that it contravened the XIV amendment to the Constitution of the United States, which provides that no State shall deny to any person within its jurisdiction equal protection of the law, and provides other limitations upon the legislative powers of the State.

Your petitioner further avers that on appeal from the Circuit Court of Sangamon County to the Supreme Court of the State of Illinois it assigned as error the refusal of the Circuit Court of Sangamon County to hold unconstitutional and void the said clauses contained in Section 105 as amended and Section 107 of the General Corporation Act of the State of Illinois.

[fols. 74 & 75] The contentions of appellant that the Illinois statutes referred to violated the Constitution of the United States were presented and argued in its behalf in the briefs and arguments in the

Supreme Court of Illinois and these contentions were decided against it by the final judgment of said Court.

Your petitioner further alleges that said suit involved the validity of a contract and that claim was made by said Roberts & Schaefer Company before final judgment was entered that a change in the rule of law or construction of a statute by the Supreme Court of Illinois applicable to said contract was repugnant to the Constitution of the United States, but that the Court decided against the claim so made.

And your petitioner further avers that in the aforesaid judgment of the Supreme Court of the State of Illinois and proceedings certain errors were committed to the prejudice of your petitioner, all of which will more fully appear from the assignment of Errors which is filed herewith.

Wherefore your petitioner prays that a writ of error from the Supreme Court of the United States may issue in this cause to the Supreme Court of the State of Illinois for the correction of errors so complained and that a transcript of record, proceedings and papers in this cause, duly authenticated by the Clerk of the Supreme Court of the State of Illinois, may be sent to the Supreme Court of the United States, as provided by law.

Dated October 21, 1924.

Johnson, Moran, Fulton & O'Donnell, Solicitors for Roberts & Schaefer Company, Petitioner and Plaintiff in Error.

[fol. 76] [File endorsement omitted]

In Supreme Court of Illinois

[Title omitted]

Assignment of Errors—Filed Oct. 22, 1924

And now comes the Roberts & Schaefer Company, a corporation, petitioner and plaintiff in error, by Johnson, Moran, Fulton & O'Donnell, its solicitors, and in connection with its Petition for a Writ of Error shows that in the records and proceedings and in the rendering of the judgment and decision of the Supreme Court of the State of Illinois, in above entitled cause, manifest error has intervened to the prejudice of this petitioner and plaintiff in error in this, to-wit:

[fols. 77 & 78] First. The Court erred in holding that Section 105 as amended by Act of May 3, 1923, and Section 107, both being Sections of the General Corporation Act of the State of Illinois, were and each of them was constitutional and that they nor either of them violated the XIV Amendment to the Constitution of the United States.

Second. The Court erred in deciding against the claim made by the Roberts & Schaefer Company, plaintiff in error, before final judgment was entered that a change in the rule of law by the Supreme Court of Illinois applicable to the contract involved in this suit was repugnant to the Constitution of the United States and in particular to Article 1, Section 10, of said Constitution.

Third. The Court erred in deciding against the claim made by the Roberts & Schaefer Company, plaintiff in error, before final judgment was entered that a change in the construction of a statute by the Supreme Court of Illinois applicable to the contract involved in this suit was repugnant to the Constitution of the United States and in particular to Article 1, Section 10, of said Constitution.

By reason whereof this petitioner, plaintiff in error, prays that the said judgment of the Supreme Court of the State of Illinois may be reversed, etc.

Dated October 21, 1924.

Johnson, Moran, Paltzer & O'Donnell, Solicitors for Roberts & Schaefer Company, Petitioner and Plaintiff in Error.

[fol. 79] [File endorsement omitted]

IN SUPREME COURT OF ILLINOIS

[Title omitted]

ORDER ALLOWING PETITION FOR WRIT OF ERROR—Filed Oct. 22, 1924

On reading of the petition of Roberts & Schaefer Company, a corporation, for writ of error and the assignment of errors, and upon due consideration of the record of said cause;

It is ordered, That a writ of error be allowed from the Supreme Court of the United States to the Supreme Court of the State of Illinois as prayed for in said petition and that said writ of error and citation thereon be issued, served and returned to the Supreme Court of the United States in accordance with law upon condition that the said petitioner and plaintiff in error, Roberts & Schaefer Company, a corporation, give security in the sum of One Thousand Dollars, that the said plaintiff in error shall prosecute said writ of error to effect and, if said plaintiff in error fail to make its plea good, shall answer to the defendant in error for all costs and damages that may be adjudged or decreed on account of said writ of error.

And the said plaintiff in error now presenting a bond in the sum of One Thousand Dollars with The National Surety Company, a corporation, as surety, it is ordered that the same be and hereby is [fols. 80–82] duly approved.

It is further ordered that said writ of error shall serve as a supersedeas in said cause.

In witness whereof, I have hereunto set my hand this 22nd day of October, A. D. 1924.

Warren W. Duncan, Chief Justice of the Supreme Court of the State of Illinois.

[fols. 83–86] Bond on Writ of Error for $1,000—Approved and filed Oct. 22, 1924; omitted in printing

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[fol. 87] [File endorsement omitted]

In Supreme Court of Illinois

Writ of Error—Filed Oct. 22, 1924.

To the Honorable the Judges of the Supreme Court of the State of Illinois, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of the State of Illinois, before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Roberts & Schaefer Company, a corporation, and Louis L. Emmerson, as Secretary of State for the State of Illinois, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of [fol. 88] their validity; a manifest error hath happened to the great damage of the said Roberts & Schaefer Company, a corporation, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable William H. Taft, Chief Justice of the

United States, the 22nd day of October, in the year of our Lord one thousand nine hundred and twenty four.

S. T. Burnett, Clerk of the United States District Court, Southern Dist. of Illinois. (Seal of the District Court United States, Southern District Illinois.)

Allowed by Warren W. Duncan, Chief Justice of the Supreme Court of the State of Illinois.

[fols. 89 & 90] IN SUPREME COURT OF ILLINOIS

CERTIFICATE OF LODGMENT

I, Charles W. Vail, Clerk of the Supreme Court, do hereby certify that there was lodged with me as such Clerk on the 22nd day of October, A. D. 1924, in the matter of Roberts & Schaefer Company, a corporation, Plaintiff in Error, vs. Louis L. Emmerson, as Secretary of State for the State of Illinois, Defendant in Error.

1. The original bond of which a copy is herein set forth.

2. A copy of the writ of error to file in my office and a copy of said writ of error for the defendant in error.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of the said Supreme Court, at Springfield, Illinois, this 28th day of October, A. D. 1924.

Chas. W. Vail, Clerk of the Supreme Court. (Seal of the Supreme Court, State of Illinois, Aug. 26, 1818.)

[fols. 91 & 92] CITATION—In usual form showing service on Louis L. Emmerson; filed Oct. 22, 1924; omitted in printing

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[fol. 93] IN SUPREME COURT OF ILLINOIS

[Title omitted]

PRAECIPE FOR TRANSCRIPT OF RECORD—Filed Oct. 22, 1924

To the Honorable Charles W. Vail, Clerk of the Supreme Court of Illinois:

Please prepare a complete transcript of the record in above cause in which final decree was rendered on October 9, 1924, for transmission to the Supreme Court of the United States in conformity with the Writ of Error from the Supreme Court of the United States which has been heretofore delivered to you.

Very respectfully, Roberts & Schaefer Company, a Corporation, Complainant in Error, by Paul O'Donnell, Attorney.

[File endorsement omitted.]

[fol. 94] IN SUPREME COURT OF ILLINOIS

RETURN TO WRIT OF ERROR

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled cause, with all things concerning the same.

In Witness Whereof I hereunto subscribe my name and affix the seal of the said Supreme Court of Illinois, in the City of Springfield, this 28th day of October, A. D. 1924.

Chas. W. Vail, Clerk Supreme Court of Illinois. (Seal.)

Endorsed on cover: File No. 30,706. Illinois Supreme Court. Term No. 210. Roberts & Schaefer Company, plaintiff in error, vs. Louis L. Emerson, as Secretary of State for the State of Illinois. Filed November 24, 1924. File No. 30,706.

(6914)

(21)

No. 210 (30706)

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1925.

ROBERTS & SCHAEFER COMPANY,
A CORPORATION,
Plaintiff in Error,

vs.

LOUIS L. EMMERSON, AS SECRETARY OF STATE FOR THE STATE OF ILLINOIS,
Defendant in Error.

ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

PAUL O'DONNELL and
CHARLES W. PALTZER,
Solicitors for Plaintiff in Error.

Solicitors for Plaintiff in Error intend to argue this case orally.

GUNTHORP-WARREN PRINTING COMPANY, CHICAGO.

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INDEX OF CASES.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1925.

ROBERTS & SCHAEFER COMPANY,
A CORPORATION,
Plaintiff in Error,

vs.

LOUIS L. EMMERSON, AS SECRETARY OF STATE FOR THE STATE OF ILLINOIS,
Defendant in Error.

ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

MAY IT PLEASE THE COURT:

This suit was brought originally in the Circuit Court of Sangamon County in the State of Illinois on the chancery side by the plaintiff in error, Roberts & Schaefer Company, which is a corporation organized and existing under the laws of the State of Illinois against Louis L. Emmerson, as Secretary of State for the State of Illinois, the defendant in error, praying a mandatory injunction against said Emmerson, requiring him to accept the sum of $200, or the proper portion thereof, as the court might determine to be the proper franchise tax

or fee due to the State of Illinois from the plaintiff in error for the year beginning July 1, 1923, or in lieu of said remedy to restrain the collection of any larger sum. (Rec., 8.)

The bill of complaint (Rec., 1 to 9) alleged and the demurrer (Rec., 9) filed thereto admitted the following to be the facts:

The plaintiff in error was incorporated prior to 1921 and on June 7, 1921, it duly amended its charter by changing the shares representing its $100,000 of capital stock from common into preferred shares but without changing the number or par value thereof and by authorizing an additional issue of 10,000 shares of common stock without nominal or par value which it was provided in the amendment should be issued fully paid up and non-assessable upon the payment of $5 for each share without nominal or par value in cash or property. (Rec., 1.) Said amendment was duly filed according to law in the office of the Secretary of State on July 1, 1921, and has been in full force and effect to the present time and fully sets forth that $150,000 consisting of 1,000 shares of preferred stock of the par value of $100 per share and 10,000 shares of no par value common stock which is fully paid up at $5 per share constitute all the capital stock authorized by the charter as amended. (Rec., 1.)

The plaintiff in error filed its annual report in due time in the year 1923 as required by law which report is the basis on which the tax assessing and collecting officer, the defendant in error, is directed to determine the proportion of the authorized capital stock of a corporation subject to the tax. (Rec., 1.) By this report the corporation stated that it was willing to be assessed and to pay a franchise tax upon all of its authorized capital stock and made no claim that it should be required to

pay only on the proportion used in Illinois although in fact a considerable part of its property and business was located and transacted in other states. (Rec., 1.) Said report also stated that the total amount of the authorized capital stock was $150,000 consisting of the number and kinds of shares above set forth. (Rec., 1.)

The defendant in error, Louis L. Emmerson, as Secretary of State for Illinois assessed against the plaintiff corporation an annual franchise tax for the year beginning July 1, 1923, in the sum of $550. He computed this sum by multiplying the 10,000 shares of common stock without nominal or par value by $100 thus making $1,000,000 and adding thereto $100,000 being the aggregate of the par value shares thus securing a total of $1,100,000 instead of $150,000 as the authorized capital stock. He computed the tax upon $1,100,000 at the statutory rate of five (5) cents for each $100, which yields a tax of $550. (Rec., 5.) The plaintiff corporation filed objections to the tax, as provided by law, with said defendant officer but he overruled the same. (Rec., 6.) Said defendant officer threatened to impose the penalties provided by law, if said sum of $550 was not paid in due time. (Rec., 6.) These penalties were 5 per cent a month for each month, or part thereof, during which the tax remained unpaid, the tax and penalty to be a lien upon personal property and real estate and to be collectible by warrant issued by the Secretary of State, which warrant the statute provided might be executed in the same manner as an execution issued by a court of record. (Rec., 3.) The other penalties provided by the law made contracts of the corporation unenforcible while tax remained unpaid, prohibited the filing of any charter amendments or other corporate papers and authorized the ouster of the corporation from exercising its

franchise. (Rec., 2.) The bill alleged that the law under which the tax was so assessed was unconstitutional and void in that it violated the Constitutions of the United States and of the State of Illinois. (Rec., 4, 5 and 6.)

The plaintiff corporation, although claiming that only $75 was due, tendered the sum of $200, or any part thereof, and offered to pay any sum which the court might find to be due as and for its franchise taxes for the year beginning July 1, 1923, but its tender was refused by the defendant officer. (Rec., 6.)

There were and are many corporations in Illinois subject to this tax having the same amount of authorized capital stock as plaintiff corporation but having the same divided into a greater or less number of par value shares or having the same divided into no par value shares in such manner that each share represented $100 of the capital stock. Such corporations were and are required by the law to pay an annual franchise tax of only $75 a year as compared with the $550 demanded from the plaintiff corporation. (Rec., 6.) Such corporations, are assessed at the rate of five cents for each $100, while plaintiff corporation is assessed at the rate of thirty-seven cents for each $100 of authorized capital stock. (Rec., 6.)

The ground for proceeding in equity was, that unless the plaintiff corporation paid the unconstitutional and invalid tax demanded, irreparable damage would be caused to it by the imposition of the penalties and the institution of the ouster proceedings threatened by the defendant officer and authorized by the law in the event of nonpayment. (Rec., 7.)

The statute of Illinois, generally known as the General Corporation Act, which imposed the franchise tax complained of, was originally enacted to take effect on July

1, 1923, and the section levying the annual franchise tax was in words and figures as follows:

> "Section 205. Each corporation for profit, including railroads, except insurance companies, heretofore or hereafter organized under the laws of this State or admitted to do business in this State, and required by this Act to make an annual report, shall pay an annual license fee or franchise tax to the Secretary of State of five cents on each hundred dollars of the proportion of its capital stock, authorized by its charter in the office of the Secretary of State, represented by business transacted and property located in this State, but in no event shall the amount of such license fee or franchise tax be less than that required by this Act of corporations having no tangible property or business in this State."

This section was unchanged at the time plaintiff corporation added the 20,000 no-par value shares to its capitalization in 1923. (Rec., 2.) After the plaintiff had so amended its charter and had been transacting business in Illinois for a period of almost two years under the charter as so amended, the Legislature of Illinois amended above Section 205, which amendment became effective on May 3, 1923, by adding to said section the following clause (Rec., 3.)

> "In the event that the corporation has stock of no par value, its shares, for the purpose of fixing such fee, shall be considered to be of the par value of $100 per share."

Article IX, Section 1 of the Constitution of Illinois provides that:

> "The General Assembly shall have power to tax * * * corporations owning or using franchises and privileges, in such manner as it shall from time to time direct by general law, uniform as to the class upon which it operates." (Rec., 8, 3.)

The part of the Fourteenth Amendment to the Constitution of the United States which the plaintiff corpora-

tion relied on above and relies on here is the provision, *"that no state shall deny to any person within its jurisdiction the equal protection of the law."* (Rec., 5.)

Another provision of the law called in question in this proceeding is the clause at the end of Section 107 of the General Corporation Act. This section provides a schedule of minimum fees or taxes to be paid by corporations and in computing said minimum directs (Rec., 5):

> "In the event that the corporation has stock of no par value, its shares, for the purpose of fixing such fee, shall be considered to be of the par value of One Hundred Dollars ($100) per share."

The foregoing clause, which is identical with the clause added to Section 105, by the amendment of May 3, 1923, was alleged to be unconstitutional and void upon the same grounds and in the same manner as the clause so added to Section 105. (Rec., 6.) Said clause at the end of Section 107, however, was in the act at the time of its original passage, in 1919, and at the time that the plaintiff corporation amended its charter and introduced shares of no par value in its charter. Under Section 107, considering the foregoing clause as valid, there, would have been owing to the state the sum of $200 for the yearly franchise tax. This sum was tendered to the Secretary of State before the filing of the bill. (Rec., 6.)

The demurrer filed to the bill in the trial court was sustained and plaintiff corporation having elected to stand by its bill the same was dismissed for want of equity and an appeal taken to the Supreme Court of Illinois. (Rec., 10.) The cause was submitted on briefs and oral argument on October 12, 1923. (Rec., 12.) The Supreme Court of Illinois, on February 19, 1924, filed an unanimous opinion holding the arbitrary valuation clauses above set forth, appearing at the end of Sections

105 and 107 of the General Corporation Act, unconstitutional and void and reversing and remanding the cause with directions to enter a decree in accordance with the prayer of the bill. (Rec., 13 to 17.) A petition for rehearing, which was later amended, was filed, also a reply thereto, and the cause was resubmitted to the court on April 14, 1924. (Rec., 17 to 45.) On June 17, 1924, the said court filed another opinion in said cause, sustaining the validity of said arbitrary valuation clauses. From this opinion Judge Thompson dissented. (Rec., 45 to 56.) A petition for rehearing was filed on July 10, 1924, by the plaintiff corporation and was denied on October 9, 1924. (Rec., 57 to 75.) Thereupon a writ of error was issued out of this court and the cause was brought here for review. (Rec., 75 to 81.) The sole question raised in this proceeding is the constitutionality of Sections 105 and 107 of the General Corporation Act of the State of Illinois and particularly the clauses designated herein as the arbitrary valuation clauses appearing at the end of each of said sections.

Assignment of Errors.

"*First.* The Court erred in holding that Section 105 as amended by Act of May 3, 1923, and Section 107, both being Sections of the General Corporation Act of the State of Illinois, were and each of them was constitutional and that they nor either of them violated the XIV Amendment to the Constitution of the United States.

Second. The Court erred in deciding against the claim made by the Roberts & Schaefer Company, plaintiff in error, before final judgment was entered that a change in the rule of law by the Supreme Court of Illinois applicable to the contract involved in this suit was repugnant to the Constitution of the United States and in particular to Article 1, Section 10, of said Constitution.

Third. The Court erred in deciding against the

claim made by the Roberts & Schaefer Company, plaintiff in error, before final judgment was entered that a change in the construction of a statute by the Supreme Court of Illinois applicable to the contract involved in this suit was repugnant to the Constitution of the United States and in particular to Article 1, Section 10, of said Constitution."

ARGUMENT.

First.

SECTIONS 105 AND 107 OF THE GENERAL CORPORATION ACT OF ILLINOIS IMPOSING AN ANNUAL FRANCHISE TAX HAVE NO TENDENCY TO PRODUCE SUBSTANTIAL EQUALITY WHEN APPLIED TO THE CLASS OF CORPORATIONS MADE SUBJECT TO THE TAX, AND RESULT IN A GROSSLY EXCESSIVE TAX AGAINST THE PLAINTIFF CORPORATION AS COMPARED WITH OTHER CORPORATIONS SUBJECT TO THE TAX.

General Corporation Act, Sections 105 and 107. Cahill's Ill. Stat. 1921, page 912.

Air-Way Electric Appliance Corp. v. *Day*, 266 U. S. 71.

Martin v. *District of Columbia*, 205 U. S. 135, 139.

Gast Realty and Investment Co. v. *Schneider Granite Co.* 240 U. S. 55, 58.

Kansas City Southern Railway v. *Road Improvement District*, 256 U. S. 658, 660.

The General Corporation Act of Illinois imposes a franchise tax of five cents on each one hundred dollars, or one-twentieth of one per cent, upon the authorized capital stock of certain corporations which are described in that section as "corporations for profit including railroads, except insurance companies, heretofore or hereafter organized under the laws of this state or admitted to do business in this state and required by this Act to make an annual report." The corporations required by the act to make annual report are designated in Section 102 of the act as follows:

"Each corporation, including railroads, domestic

> and foreign, other than homestead associations, building and loan associations, banks, religious corporations, insurance companies and corporations not for pecuniary profit, shall make a report in writing, etc."

The plaintiff corporation was organized under the laws of the State of Illinois for profit and since its organization has been engaged in the business of engineering and contracting as authorized by its charter. (Rec., 1.) It, therefore, is subject to the tax. The general classification does not appear to be objectionable although it does not include a number of corporations organized for pecuniary profit, such as banks and insurance companies. The tax is in addition to the general real estate, personal property and capital stock taxes. The act does not tax equally or uniformly members of this general class so carved out and designated by the act for the purpose of taxation. It is admitted (Rec., 6) that there are many corporations within the state subject to the tax having an authorized capital stock of the exact amount as plaintiff corporation ($150,000) represented by shares of par value and many others having the same authorized capital stock but represented by shares without nominal or par value in such numbers that each of such shares represent $100 of the authorized capital stock and that these corporations are required to pay an annual tax of only $75, while the plaintiff corporation is required to pay an annual tax of $550. The tax rate, in other words, on the former corporation is five cents on each hundred dollars, or one-twentieth of one per cent, and upon the plaintiff corporation is thirty-seven cents for each hundred dollars, or seven and one-half times as much.

The reason for this glaring inequality is to be found in the clause which will be referred to herein as the

Arbitrary Valuation Clause which appears in identical language at the end of Section 107, as originally enacted, and at the end of Section 105, as amended by Act of May 3, 1923. Said Arbitrary Valuation Clause is as follows:

> "In the event that the corporation has stock of no par value, its shares, for the purpose of fixing such fee, shall be considered to be of the par value of $100 per share."

As pointed out in the petition for rehearing filed by the plaintiff corporation in the Supreme Court of Illinois, the language of the foregoing clause is inexactly worded. (Rec., bot. p. 58, 59 and 60.) However, construing it so as to make it intelligible, the clause would read, "In the event that the corporation has *shares* of no par value, *such* shares, for the purpose of fixing such fee, shall be considered to be of the par value of $100 per share." This is the construction applied by the defendant, Secretary of State, in assessing the franchise tax since the enactment of the statute. The obvious result of these Arbitrary Valuation Clauses is to tax each nonpar value share at five cents per share. The tax itself is imposed upon the amount of the "capital stock authorized by its charter in the office of the Secretary of State." Where, therefore, a corporation has shares of no par value, these Arbitrary Valuation Clauses direct the Secretary of State to set up a fictitious amount as the amount of the authorized capital stock by taking the aggregate amount represented by par value shares at the par value thereof and adding to it a sum secured by multiplying the total number of nonpar value share by $100. The tax directed by the act to be imposed is at the rate of five cents on each $100 of the authorized capital stock thus determined. For the purpose of convenience, it may be noted that the tax upon a given amount of authorized capital stock is quickly determined

by dividing that amount by two thousand (2,000). So far as the nonpar value shares are concerned, however, it is clear that the tax is five cents a share in the final result although it is obtained by arbitrarily fixing the value of each share as a part of the capital stock at $100 and then taxing that $100 at five cents.

The General Corporation Act of Illinois requires the application for a charter to state the total amount of authorized capital stock and the number and kind of shares into which the same shall be divided. The act permits the provision for shares with a par value of not less than $5 or more than $100 per share and permits the issuance and sale of nonpar value shares at not less than $5 or more than $100 per share. (Sections 4 and 32.)

With the foregoing provisions of the law in mind, it is clear from the schedule given below that the act in question in this case has no tendency to produce equality of taxation among the corporations subjected by the act to the tax. We set out in each case in the schedule the sum of $150,000 being the amount of actual paid-in capital stock of plaintiff corporation for which all of its shares, both par and nonpar value, have been issued as admitted by the pleading. (Rec., 1.)

SCHEDULE.

$150,000 capital stock represented by 30,000 shares of the par value of $5 each would be subject to a tax of	$75
$150,000 capital stock represented by 30,000 nonpar value shares would be subject to a tax of	$1,500
$150,000 capital stock represented by 1,500 nonpar value shares would be subject to a tax of.	$75
$150,000 capital stock represented by 1,000 shares of the par value of $100 each and 10,000 nonpar value shares would be subject to a tax of	$550

The last illustration in above schedule is the case of the plaintiff corporation. It is obvious that an almost infinite number of variations in the number and kind of shares representing a given amount of capital stock might be set down, each of which would subject the corporation to a different tax than anyone of the other variations. The variable quantity is the number of nonpar value shares authorized to be issued to represent the amount of the capital stock authorized by the charter. As among corporations having only par value shares all issued, there is no variation or inequality in the tax but the variation and inequality exists by comparison between the companies with their authorized capital stock represented in whole or in part by nonpar value shares and exist whether all or only a part are issued. As shown in the illustration given in above schedule, a corporation representing its capital stock by 30,000 nonpar value shares is required to pay twenty times as much tax as the corporation using only 1,500 nonpar shares to represent the same amount of capital stock. The amount of the tax, therefore, is made to depend merely upon the number of the authorized nonpar value shares.

This court has, in the cases cited above under this heading, laid down the rule that a statute providing for a tax "of such a character that there is no reasonable presumption that justice generally will be done but the probability that the parties will be taxed disproportionately to each other and to the benefit conferred, the law cannot stand against the complaint of one so taxed in fact." (Kansas City Ry case and Gast Realty Co. *supra.*) Such an act violates the Equal Protection Clause of the Fourteenth Amendment. It also violates Article IX, Section I of the Constitution of Illinois which requires that taxes on corporations owning or using franchises and privileges shall be uniform as to the class

upon which it operates. We have pointed out at the beginning of the argument under this heading the class created specifically by the legislature upon which it imposed this franchise tax. That class includes railroads and every kind of commercial corporation with the two principal exceptions of banks, and insurance companies.

This tax is not insignificant but in fact very burdensome. In the extreme case of a corporation having all of its capital stock represented by nonpar value shares in the maximum amount permitted by the statute whereby each share represented $5 of the capital stock, the tax would be at the rate of 1 per cent a year upon the amount of the corporation's capital stock. In other words, in that case the corporation during its corporate life of ninety-nine years would pay out in taxes a sum equal to approximately the entire amount of its capital stock, while other competing corporations having par value shares only would pay out one one-twentieth of that amount.

We point out also that this extreme and unequal tax *was not* provided for by the laws of Illinois at the time that the plaintiff corporation introduced into its capitalization shares of no par value. It was two years after plaintiff corporation had, with the consent of the state, amended its charter contract so as to include nonpar value shares and two years after it had issued to the public said shares that the state determined to impose this arbitrary and unequal tax.

There can be no question that the plaintiff corporation is taxed unequally and excessively as compared with corporations having par value shares only and as compared with corporations having a less number of nonpar value shares representing the same amount of capital stock. There is no legislative classification directly

made classifying corporations into those having par value shares and those having nonpar value shares, though the effect of the act is to make such a subclassification within the general classification and to make an infinite number of subclassifications depending upon the number of nonpar value shares used to represent a given amount of capital stock.

Second.

THE MERE NUMBER OF AUTHORIZED NONPAR VALUE SHARES IS NOT A REASONABLE BASIS FOR THE CLASSIFICATION OF CORPORATIONS FOR THE PURPOSE OF DETERMINING THE AMOUNT OF THE ANNUAL FRANCHISE TAX LEVIED AGAINST THEM. SUCH A CLASSIFICATION IS NOT BASED ON ANYTHING HAVING A REASONABLE AND JUST RELATION TO THE THINGS IN RESPECT TO WHICH SUCH CLASSIFICATION IS IMPOSED.

Air-Way Electric Appliance Corp. v. *Day*, 266 U. S. 71.

Ky. Railway cases, 115 U. S. 321, 337.

Southern Railroad Co. v. *Green*, 216 U. S. 400.

Royster Guano Co. v. *Virginia*, 253 U. S. 412, 415.

People ex rel. v. *Mensching*, 187 N. Y. 8, 79 N. E. 884; 10 L. R. A. N. S. 625.

People ex rel. v. *Walsh*, 195 N. Y. Sup. 184.

Magoun v. *Ill. Trust & Savings Bank*, 170 U. S. 283.

Hayes v. *Missouri*, 120 U. S. 68.

Barbier v. *Connolly*, 113 U. S. 27.

The general principle which all of the above cited cases sustains is that the Equal Protection of the Law Clause requires that the same means and methods be applied im-

partially to all of the constituents of each class so that the tax shall operate equally and uniformly upon all persons in similar circumstances. That a corporation is a person within the meaning of the Fourteenth Amendment is no longer open for discussion. (See cases cited in *Southern Railway Co.* v. *Green*, 216 U. S. at bot p. 412 and top p. 413.)

In the Southern Railroad case, *supra*, the State of Alabama imposed a franchise tax upon foreign corporations already admitted to the state, greatly in excess of that required to be paid by domestic corporations. We quote from the opinion of this court:

> "While reasonable classification is permitted, without doing violence to the equal protection of the laws, such classification must be based upon some real and substantial distinction, bearing a reasonable and just relation to the things in respect to which such classification is imposed; and classification cannot be arbitrarily made without any substantial basis. Arbitrary selection, it has been said, cannot be justified by calling it classification. *Gulf, C. & S. F. R. Co.* v. *Ellis*, 165 U. S. 150, 155, 165, 41 L. ed. 666, 668, 671, 17 Sup. Ct. Rep. 255; *Cotting* v. *Kansas City Stock Yards Co.* (*Cotting* v. *Godard*) 183 U. S. 79, 46 L. Ed. 92, 22 Sup. Ct. Rep. 30; *Connolly* v. *Union Sewer Pipe Co.* 184 U. S. 540, 46 L. ed. 679, 689, 22 Sup. Ct. Rep. 431.
>
> It is averred in the complaint, and must be taken as admitted, that there are other corporations of a domestic character in Alabama, carrying on the railroad business in precisely the same way as the plaintiff. It would be a fanciful distinction to say that there is any real difference in the burden imposed because the one is taxed for the privilege of a foreign corporation to do business in the state, and the other for the right to be a corporation. The fact is that both corporations do the same business in character and kind, and under the statute in question a foreign corporation may be taxed many thousands of dollars for the privilege of doing, within the state, exactly the same business as the domestic corpora-

tion is permitted to do by a tax upon its privilege, amounting to only a few hundred dollars. We hold, therefore, that to tax the foreign corporation for carrying on business under the circumstances shown, by a different and much more onerous rule than is used in taxing domestic corporations for the same privilege, is a denial of the equal protection of the laws, and the plaintiff being in position to invoke the protection of the 14th Amendment, that such attempted taxation under a statute of the state does violence to the Federal Constitution."

We submit that the implied classification of corporations into an infinite number of classes depending upon the number of no par value shares authorized by their respective charters is even more fanciful than the classification of corporations into domestic and foreign corporations for the purpose of taxation. The act complained of herein applies alike to domestic and foreign corporations and applies its discriminatory and burdensome tax upon foreign corporations having nonpar value shares as well as upon domestic. As a practical matter, there is a much larger percentage of foreign corporations having nonpar value shares as compared with all such corporations than there are of domestic corporations having nonpar value shares as compared with all domestic corporations in Illinois.

Headings I and II above are almost exact quotations from the last paragraph of this court's decision in the Air-Way Electric Appliance case. This case was decided by this court on October 20, 1924. The case came up from Ohio under a statute imposing a tax of five cents on each share of nonpar value stock authorized by the charter of the plaintiff corporation in that case.

This court held that the tax, since it was based upon the authorized capital stock, a part of which only was outstanding, necessarily amounted to a direct burden

upon the property and business outside of Ohio, including the interstate commerce of the plaintiff corporation in that particular case. This court held also that the tax was arbitrary because it was not measured by the value of the privilege, or anything having a reasonable relation to that value. The court in that opinion says:

> "The fee determined by the lower court, as well as that fixed by the state officers, is arbitrary. Without holding that such a charge must be measured by the value of the privilege for which it is imposed, it may be said that some relation to such value is a reasonable requirement. Indeed, under the constitution and laws of Ohio, a tax on privileges and franchises cannot exceed the reasonable value of the privilege or franchise originally conferred or its continued annual value thereafter. * * * The number of nonpar value shares of the corporation is not an indication of, and does not purport to be a representation as to, the amount of its capital. * * *
>
> It is clear that the mere number of authorized nonpar value shares is not a reasonable basis for the classification of foreign corporations for the purpose of determining the amount of such annual fees. Such a classification is not based on anything having relation to the purpose for which it is made. *Southern Railway Co.* v. *Greene*, 216 U. S. 400, 417; *Royster Guano Co.* v. *Virginia*, 253 U. S. 412, 415."

We have pointed out above that the tax in Illinois is in effect a tax of five cents a share for each nonpar value share exactly the same as in the Ohio statute and produces exactly the same inequality of taxation. The Air-Way case is so clearly in point and controlling in the case at bar that we would end our brief here except for the fact that the Secretary of State and Attorney General of Illinois contend that it does not control in this case.

In the case of *Royster Guano Company* v. *Virginia*, 253 U. S. 412, cited by the court in the *Air-Way case*,

supra, the validity of an income tax on corporations imposed by the law of Virginia was called in question. The Virginia law provided that the tax should be based upon the entire business income of the corporation from business conducted in other states as well as business conducted in Virginia in the case of corporations doing any part of their business in Virginia. The law further provided that corporations organized in Virginia but doing no business in that state should be exempt from the payment of this tax. The plaintiff corporation in that case was a domestic corporation. This court held that the Virginia law violated the Equal Protection Clause of the Fourteenth Amendment because the corporations doing part of their business in the state were taxed excessively and corporations doing no business in the state were exempt. This case is an application of the rule having for its purpose the protection of domestic corporations from unequal taxation in *Southern Railway Co. v. Green* to protect a domestic corporation from unequal taxation.

In the case of *Southwestern Bell Telephone Company v. Middlekamp*, 1 Fed. (2nd) page 563, the federal court passed upon the validity of the franchise tax law of the State of Missouri which required corporations to pay a franchise tax of a certain percentage upon the paid in capital stock and upon the surplus. The same law provided a nominal fee of $25 per year as the tax upon corporations having shares without nominal or par value. A corporation having par value shares questioned the validity of this law on the ground that there was no valid distinction between companies having no par value shares and companies having par value shares and that, therefore, the tax of a given percentage upon the par value companies while assessing the nonpar

value companies at a nominal tax of $25 per year denied to the par value company equal protection of the law. The court in a long and carefully considered opinion held that the law violated the Equal Protection Clause of the Fourteenth Amendment. The court in this case applied the rule in the Southern Railway Company and the Royster Guano Company cases above cited and found that there was no reasonable basis for classifying corporations into par value and nonpar value companies for the purpose of determining the amount of the annual franchise tax.

In the case at bar, the discrimination works in the opposite direction. It discriminates against nonpar value companies as compared with par value companies. It further discriminates as between different nonpar value companies depending solely on the question of the number of shares which the company happens to have issued to represent its authorized capital stock.

In the case of *People, ex rel*, v. *Mensching*, 187 N. Y. 8, 79 N. E. 884, the court passed upon the validity of a transfer tax which imposed a tax of two cents a share upon all shares of stock transferred in the State of New York. The effect of this transfer tax was exactly the same so far as creating inequality is concerned as the franchise tax of Ohio in the Air-Way case and the franchise tax of Illinois in this case. The court in Mensching case says:

> "The act now before us does not classify by arranging according to quality, but by arranging according to accident. While it places all corporate shares in a class, still it does not treat all members of the class alike, but without method or order bears heavily upon some and lightly upon others, which, in effect, is a further classification. Thus it imposes the same tax on the sale of dollar shares and

> hundred dollar shares. The tax is measured by the number of shares, regardless of face value or actual value."

In the case of *People, ex rel,* v. *Walsh,* 195 N. Y. Sup., 194, the New York franchise tax law came before the court for review. The law in that case provided that if a corporation subject to the tax had stock without par value that its shares without par value shall be deemed to have a face value of $100 each for the purposes of the assessment. In other words, the New York statute, while based upon the issued shares, or paid in capital stock, instead of upon the authorized as in Illinois, did provide for an arbitrary valuation of nonpar shares to arrive at the basis on which the tax was computed the same as is provided for in the arbitrary valuation clauses of the Illinois law. The court held this method of assessment unconstitutional on the authority of the Mensching case, *supra*. In the decision, the court said:

> "The computation of one hundred dollars required by the provision as thus construed to be placed upon every share of no par value stock is entirely arbitrary, and necessarily would result in unequal taxation. It would require corporations having issued stock of the actual value of five dollars per share to pay the same tax per share as corporations having issued stock the shares of which were in fact worth one thousand dollars per share. It might have the result of compelling corporations, employing in this state a capital of only one thousand dollars, to pay, for the privilige of doing their limited business, the same taxes as corporations employing within the state a capital of two hundred thousand dollars. The words above quoted from the opinion of Judge Vann in the Mensching case apply with equal force to the tax sought to be imposed in the case at bar, under the provision quoted from Section 214 of the Tax Law, and compel the conclusion that the provision is unconstitutional."

The greatest injustice and inequality existing in the

Illinois law in practical operation arises from these arbitrary valuation clauses. It supplements and augments other inequalities of that act. The arbitrary valuation clauses are distinct from the remainder of the act and the act is entirely enforcible, if valid, after the elimination of the arbitrary valuation clauses at the end of Sections 105 and 107. The act otherwise produces substantial inequalities by reason of the fact that the tax provided for is based upon the authorized instead of upon the paid-in capital stock. The amount of the franchise tax, in other words, is determined by the combination of two fictitious elements of valuation, the first element being an arbitrary valuation of nonpar value shares at $100 a share and the second being the assessment of the franchise upon the basis of the amount of money which the company is *authorized* to obtain by the sale of its shares of stock rather than upon the amount which is *actually* obtained by the sale of its shares.

Third.

THE USE OF THE AMOUNT OF THE AUTHORIZED CAPITAL STOCK OF THE CORPORATION AS THE BASIS FOR DETERMINING THE AMOUNT OF THE ANNUAL FRANCHISE TAX IMPOSED UPON CORPORATIONS HAS NO TENDENCY TO PRODUCE SUBSTANTIAL EQUALITY WHEN APPLIED TO THE CLASS OF CORPORATIONS MADE SUBJECT TO THE TAX AND RESULTS IN A GROSSLY EXCESSIVE TAX AGAINST SOME CORPORATIONS AS COMPARED WITH OTHER CORPORATIONS SUBJECT TO THE TAX.

Citations the same as appear under the first heading, *supra.*

Under the first heading of this argument we have set forth the parts of the statute indicating the class of

corporations which are carved out by the act and made subject to the annual franchise tax. We invite the court's attention under this section to the inequalities which are created by the fact that the tax is based upon the amount of the authorized capital stock, while in the first heading we invited the court's attention to the inequalities created by the tax upon nonpar value shares by the arbitrary valuation clauses. At the time a corporation is organized it is usually impossible to tell the total amount of paid-in capital stock which the business of the company will require during the course of its development. If the amount is determined at a small sum and it subsequently develops that a larger sum is needed it is necessary then to amend the charter of the corporation so as to increase the amount of its authorized capital stock and number of shares so that it may obtain an additional amount of paid-in capital stock. Where the original shares of capital stock have been issued to the public by a wide distribution to a large number of stockholders or investors it is frequently quite burdensome and sometimes impossible to obtain the necessary number of stockholders to attend a stockholders' meeting and vote for a resolution increasing the amount of the authorized capital stock and number of shares thereof. Under the Illinois statute a two-thirds vote is required to amend the charter. This problem is necessarily solved by providing in the original charter for a large enough number of shares representing a large enough amount of authorized capital stock to provide for all probable necessities. When this is done it is seldom that the corporation can secure investors to buy the entire number of shares authorized and it is frequently undesirable for the corporation, in its earlier stages of development, to have an excess amount of capital. The

corporation therefore finds itself in a position, under the tax law of Illinois, where it is required to pay for the privilege of exercising its franchise to be a corporation a sum greatly in excess of the value of that franchise. The larger corporations distributing their shares over a more widely scattered and larger number of investors or shareholders are taxed unequally as compared with the smaller and closely held coporations which can determine with more exactitude the minimum amount of authorized capital stock and authorized shares which will meet its necessities. This inequality exists regardless of whether the corporation has par value shares or nonpar value shares, and will still exist when the objectionable arbitrary valuation clauses on nonpar value shares are eliminated from the statute levying the tax. To illustrate this, let us consider two corporations each having an authorized capital stock of $1,000,000, divided into par value shares. Let us assume that the first corporation has issued only $500,000 of its authorized capital stock and received as working capital only that amount. Its tax would be $500 per year. Let us assume that the second corporation has issued the entire number of its authorized shares and received therefor $1,000,000. Its tax would be $500 per year. In other words, each corporation would pay the same tax but it cannot be contended that the value of the privilege taxed is the same in each case. The first corporation transacts business as a corporation with only half as much paid in capital stock as the other corporation, and while the tax in dollars is the same, the tax rate of the first is double that of the second.

This court held in the Air-Way case, *supra,* as follows:

> "The number of shares not subscribed or issued has no relation to the privilege held by the plain-

tiff in Ohio and is not a reasonable measure of such a fee. Such shares may never be subscribed or issued or additional shares may be issued to acquire property or to do business in other states or to carry on interstate commerce. Plainly, the fee to the extent that it is based on the number of shares in excess of those outstanding has no relation to what was paid in for the stock or to its value or to the amount of the plaintiff's capital, its property or its business, intrastate in Ohio or interstate. The act in its practical operation does not require like fees for equal privileges held by foreign corporations in Ohio under the same circumstances."

It is unnecessary to reiterate the decisions in the Southern Railway case and in the Kentucky Railway cases, and numerous other cases heretofore referred to, to establish the proposition that a tax which is clearly unequal in its effect among members of the same class cannot be sustained by assuming that the legislature had in mind a sub-classification based upon the relative amount of the authorized capital stock paid into the various corporations or the relative number of shares of the various corporations issued and outstanding. Such an assumed classification bears no reasonable or just relation to the things in respect to which such classification is imposed. The object sought by the statute is to tax the various corporations for a valuable privilege granted by the state namely that of being a corporation, or in case of foreign corporations the privilege of exercising their franchise in Illinois. The value of the privilege, to both domestic and foreign corporations, of doing business in Illinois cannot be measured by the amount of capital stock authorized or by the number of shares authorized to be issued to represent the same. There is no reasonable or just relationship between them. Any such distinction between corporations which is based upon whether or not they have been able to sell

all their capital stock is purely fanciful. The amount of paid in capital, or paid in and earned surplus and capital does have a direct relationship to the value of the privilege of being a corporation and doing business with the capital and surplus which the corporation actually has. To tax a corporation, however, on the basis that it franchise or right to do business as a corporation in Illinois can be measured by the amount of money which it is authorized to secure by the sale of its authorized number of shares must necessarily result in unequal taxation as among the corporations taxed because the basis is purely arbitrary and has no actual relation to the value of the privilege or to the amount of money which the corporation has actually received from the sale of such shares of capital stock. While there might be some justification for the state to use the amount of the authorized capital stock in fixing the initial fee for domestic corporations, or the entrance fee for foreign corporations, there can be none for using that as a basis for determining the annual franchise tax. It might be argued that for the initial or entrance fee, which is paid but once, as a matter of convenience the state should be allowed to tax upon the entire amount of the authorized capital stock. This initial or entrance fee is not involved in this case. There can be no annual franchise tax, however, which will bear fairly and equally upon all corporations subject to the tax, those having par value shares, those having nonpar value shares, those having part of their shares issued and those having all of their shares issued, except a tax based upon the paid-in capital stock and surplus or, as it is usually designated, capital and surplus. If the state taxes capital only it, of course, loses the tax which it could legitimately demand by making the basis both capital and surplus.

The omission of the surplus as a part of the basis for measuring the tax would not in our opinion make the law invalid. Under the Illinois law as it now stands a tax upon the paid-in capital stock could easily and conveniently be imposed because Section 28 of the General Corporation Act requires each corporation to file with the Secretary of State, within ninety days after the issuance, a report giving the number and kind of shares issued, the amount of money received for them, makes stock issued but not reported an unlawful issue and permits the purchaser to recover from the corporation the amount paid thereon, with interest and reasonable attorneys' fees. Whenever such a report is filed the Secretary of State can at once determine the amount of the additional franchise tax due and can collect the same at that time. Using the paid-in capital stock as the basis for the tax would of itself necessarily eliminate the arbitrary valuation clauses above referred to since the tax would be computed at a uniform rate upon all corporations, upon the actual amount of money they had been able to secure as capital for the conduct of their business.

Fourth.

THE ADDITION OF THE ARBITRARY VALUATION CLAUSE TO SECTION 105, BY THE ACT OF MAY 3, 1923, TOGETHER WITH THE DECISION OF THE SUPREME COURT THEREON, INVOLVED HEREIN, IMPAIRS THE VALIDITY OF THE CHARTER CONTRACT OF THE PLAINTIFF CORPORATION.

Article I, Section 10, of the Constitution of the United States.

American Smelting & Refining Co. v. *Lindsay*, 204 U. S. 103.

People, ex rel Roberts & Schaefer Co. v. *Emmerson*, 305 Ill. 348.

Armstrong v. *Emmerson*, 300 Ill. 54.

The plaintiff corporation was organized prior to 1921 and on July 1, 1921 filed an amendment to its charter whereby it added the 10,000 shares of nonpar value to its capitalization. The law in force at the time of said amendment imposed no arbitrary valuation of nonpar shares upon corporations desiring to use the same so far as the regular annual tax was concerned. It cannot be said, therefore, that this company provided for such stock with the knowledge that it would be required to pay an exeecssive and unequal tax by reason of that fact. The statute as it stood in 1921 we must assume contained all the elements entering into the charter contract between the state and the plaintiff corporation.

The uniform definition of capital stock, in the decisions of the State of Illinois up to 1921, had been that the capital stock of a corporation meant, when referring to the amount paid in for issued and outstanding shares, the amount of money actually paid into the corporation for such shares, and when referring to the

amount of the *authorized* capital stock meant the amount of money necessary to be paid to secure the issuance of all of the authorized shares of capital stock. Since this matter is discussed in detail in the petition for rehearing filed by plaintiff corporation below and appears on pages 57 to 77 of the record, the same will not be repeated in the brief but particular reference is made to pages 64 and 65 of the record. In the case of *Armstrong* v. *Emmerson*, 300 Ill. 54, at 58, 132 N. E. 768, at 769, the Supreme Court of Illinois defined capital stock as follows:

> "Capital stock is the sum fixed by the corporate charter as the amount paid in or to be paid in by the stockholders for the prosecution of the business of the corporation and for the benefit of corporate creditors."

This case was decided in October, 1921, and is referred to merely because of the clear statement of a definition which had been the law in Illinois for many years prior thereto. See *Slater* v. *Taylor*, 241 Ill. 102, 89 N. E. 271 at 272. In 1922, Louis L. Emmerson, who was then Secretary of State for Illinois, imposed upon the plaintiff corporation the same tax as is herein complained of. The arbitrary valuation clause herein complained of did not appear at the end of Section 105 of the General Corporation Act in 1922 but the said Emmerson read it in by interpretation at that time. His ruling and the tax imposed was called in question in the case of *People ex rel. Roberts & Schaefer Company* v. *Emmerson*, 305 Ill. 348, in a case brought by the plaintiff corporation in 1922. This case was decided on October 21, 1922, and rehearing was denied December 13, 1922. The court in that case sustained plaintiff corporation's contention that the construction of the Secretary of State was un-

authorized by the law, and reiterated the definition as to authorized capital stock, at page 351, as follows:

> "The amount of authorized capital stock means the total sum of money necessary to be paid into the treasury of the corporation to secure the issuance of the total number of shares of stock authorized by the Articles of Incorporation. The total amount of the authorized capital stock of relator, according to the verified annual report filed with the Secretary of State, is $150,000."

In this same case at page 349, the court construed the charter contract of the plaintiff corporation and states:

> "A certificate of increase of capital stock was duly filed with the Secretary of State showing that the amount of increased capital stock which it was proposed to issue at once was 10,000 shares of common stock having no par value, which was of the value of $50,000, that all this increased capital stock was to be issued at once for property and that the property for which the stock was to be issued was $50,000 * * * to be transferred from the surplus account of the company to the capital account, in full payment of the 10,000 shares of no par value common stock."

It appears clearly, therefore, that at the time of the passage of the amendment of May 3, 1923, adding the Arbitrary Valuation Clause to Section 105, the charter of the plaintiff corporation, which is a contract with the State of Illinois, provided for an authorized capital stock of $150,000 only. The state then, by means of the arbitrary valuation clause, changed the contract of the plaintiff corporation so as to make its authorized capital stock, for taxing purposes, $1,100,000 instead of $150,000. The Supreme Court of Illinois had within two years previous to the decision herein appealed from expressly construed the charter of this particular plaintiff corporation as above set forth and found that it had an authorized capital stock of $150,000 only. It has been

the rule since the Dartmouth College case that a charter of a corporation is a contract with the state and the state cannot impair the same by a subsequently enacted law. This rule was applied in the case of *American Smelting & Refining Co.* v. *Lindsay*, 204 U. S. 103. In that case a foreign corporation was admitted to do business in the State of Colorado for a period of twenty years and at the time of its admission the statute imposed upon it the liabilities, restrictions and duties which theretofore or thereafter might be imposed upon domestic corporations of like character. The state later passed a franchise tax law which imposed a tax upon foreign corporations in double the amount of that imposed upon similar domestic corporations. This court held that the admission of the corporation into the state constituted a contract and that one of the terms of the contract was the law as it existed at the time of admission, which specified that it should be subject only to the same liability as domestic corporations. The court declared the tax law unconstitutional because it impaired the validity of the charter contract. In the case at bar the charter contract was that the plaintiff corporation should have, among other things, the right to do business as a corporation with an authorized capital stock of $150,000 represented by 1,000 shares of the par value of $100 each and 10,000 shares without par value. The legislature subsequently and in face of the decision of the court expressly construing this charter contract passed a law which in effect made the authorized capital stock for taxing purposes $1,100,000. This law enacted on May 3, 1923, is invalid under Article I, Section 10, of the Constitution of the United States.

In the case of *Muhlker* v. *New York & Harlem Railroad Company*, 197 U. S. 544, there was brought to this court

for review a case in which the court of last resort in New York refused to allow damage to a property owner for the injury to his easement of light and air caused by the elevation of the tracks of the railroad corporation. The New York courts had, in the Elevated Railroad Cases, being the Story and Lahr cases, laid down the rule that the abutting property owners on a street had rights or easement of light, air and access appurtenant to their lots. Muhlker purchased his property after the Elevated Railroad Cases and in reliance upon the doctrine therein set forth. The court held that the state courts may change or modify their decisions, but stated, "that such power cannot be exercise to take away rights which have been acquired by contract and which have come under the protection of the Constitution of the United States, and we determine for ourselves the existence and extent of such contract. This is a truism; and when there is an adversity of such decisions, the first in time may constitute the obligation of the contract and measure the rights under it,—hence, the importance of the Elevated Railroad Cases and the determination they had pronounced when the plaintiff acquired his property." The court decided in that case that the change of the rule of law in the Muhlker case by the New York court violated Article I, Section 10 of the Constitution of the United States in that it impaired the obligation of a contract.

In the case at bar, the legislature impaired the obligation of the charter contract between the plaintiff corporation and the state by enacting the amendment of May 3, 1923, inserting the arbitrary valuation clause into the statute. The Supreme Court of Illinois cannot, under the ruling in the Muhlker case, make this act valid by changing the rule of law already laid down by it con-

struing and determining the extent of the charter contract of the plaintiff corporation.

We have heretofore under the second heading in this argument pointed out that a tax such as the one involved here which is based upon the number of authorized nonpar value shares violates the Equal Protection Clause of the Fourteenth Amendment. The Supreme Court of Illinois in the decision appealed from changes the construction it had previously placed upon the plaintiff corporation's charter and construed it to mean that it did not state the total amount of the authorized capital stock but merely stated the number and par value of the par value shares and the number of the nonpar value shares. However, even under this changed construction of the plaintiff corporation's charter contract the tax is still bad because it still remains based upon the number of nonpar value shares. The law even under this construction continues to tax the plaintiff corporation at the rate of five cents a share on its nonpar value shares which actually amounts to a tax of one per cent upon the amount of capital represented by those shares while par value companies and other nonpar value companies each of whose shares represent $100 of capital are taxed at the rate of one-twentieth of one per cent upon their capital stock. It is clear, therefore, that there is no construction which can be given either to the statute or the plaintiff corporation's charter which will obviate the fact that the plaintiff corporation and many other similar corporations are denied equal protection of the law because taxed unequally and unjustly as compared with other similar corporations.

In conclusion we beg to summarize the points in this argument.

The law called in question here obviously taxes members of the same class unequally. The tax falls lightly on some and heavily on others without rule or reason, depending merely upon chance. A corporation may be taxed heavily because by chance the corporation provided for a large amount of authorized capital stock, the shares of which it was unable to sell and convert into paid-in capital. This is the fundamental defect in the law. The number of shares which a corporation is authorized to issue has no relation whatsoever to the value of the franchise of being and transacting business as a corporation. It is for this privilege or franchise that this tax is levied. The amount of paid-in capital stock or that amount plus paid-in or earned surplus presents a reasonable basis for determining the value of this franchise or privilege. This initial error or defect probably accounts for both the enactment of the arbitrary valuation clause and the error of the Supreme court of Illinois in the decision appealed from in this case. Both the legislature and the Supreme Court of Illinois recognized that the authorized but unissued shares of nonpar value could not be taxed as par value shares could be without determining a sum which would be the aggregate amount of such authorized but unissued nonpar value shares. It is obvious that no such difficulty existed in the case of issued nonpar value shares since the amount received by the corporation on them was easily determined. Such is the case of the plaintiff corporation. The Supreme Court of Illinois in its desire to uphold the constitutionality of the act, if possible, reversed its previous decisions construing the act in which it held that the charter must set forth the total amount of the authorized capital stock whether represented by

par or nonpar value shares. These previous decisions, if adhered to, would have made the act workable but would necessarily have required the court to hold the arbitrary valuation clause unconstitutional. That construction, however, would not have changed the fact that the use of the authorized instead of the paid-in capital stock as the basis of the tax necessarily resulted in unequal taxation as between different corporations subject to the tax.

The only method by which this latter inequality can be obviated is by changing the basis on which the franchise tax is assessed and making that basis the paid-in capital stock and surplus. When the basis is changed from authorized capital stock to paid-in capital stock, the arbitrary valuation clauses are necessarily eliminated. Retaining authorized capital stock as the basis and retaining the arbitrary valuation clauses results in inequality from two different sources. The inequality from one source is injurious to certain corporations and from the other source to other corporations and sometimes the same corporation is injured by reason of each of these provisions.

Finally, so far as the plaintiff corporation is concerned, it has an additional ground for complaint in that the law impairs the validity of its charter contract with the state by imposing a tax so onerous as to abrogate one of the essential provisions in that charter contract, namely, the right to have 10,000 shares of nonpar value representing $50,000 of capital stock. Much confusion in the law of corporations in Illinois has resulted from the decision appealed from and great hardship is imposed upon corporations with respect to this tax because of the uncertainty as to what amount, if any, is

due and the excessive penalties for nonpayment. The decision of the court in this case is therefore, awaited with great interest by corporate business and the members of the bar of Illinois.

All of which is respectfully submitted.

Charles W. Pattee

Solicitors for Plaintiff in Error.

No. 210 (30706)

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1925.

ROBERTS & SCHAEFER COMPANY,
A CORPORATION,
Plaintiff in Error,

vs.

LOUIS L. EMMERSON, AS SECRETARY OF STATE
FOR THE STATE OF ILLINOIS,
Defendant in Error.

ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

REPLY BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

PAUL O'DONNELL,
CHARLES W. PALTZER,
Solicitors for Plaintiff in Error.

HAWKINS & LOOMIS CO., LAW PRINTERS, CHICAGO

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1924.

No. 210 (30706)

ROBERTS & SCHAEFER COMPANY,
A CORPORATION,
Plaintiff in Error,

vs.

LOUIS L. EMMERSON, AS SECRETARY OF STATE
FOR THE STATE OF ILLINOIS,
Defendant in Error.

ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

REPLY BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

MAY IT PLEASE THE COURT:

We trust that we have been able to make the points on which we rely more clear than the brief of our opposing counsel would indicate. We are not basing our argument against the Franchise Tax Law of the State of Illinois at all, in this case, upon the ground that it burdens interstate commerce, because the facts presented by the record in this case do not raise that question and such a question is always, in each case, determined by the actual facts in the case and not by general principles or theories of law. We do place our

main reliance in this Court on the decision in the *Airway Electric Appliance Corp.* v. *Day*, 266 U. S. 71. We do contend that this Court, in that case, did decide that a franchise tax, which is measured by the number of authorized non-par value shares is unconstitutional, because it violates the equal protection clause of the Federal Constitution. We do contend that the *Airway case* is absolutely in point on the main point raised against the constitutionality of the Illinois Franchise Tax Law.

It is true that this Court found that the Franchise Tax Law of Ohio, in that case, unconstitutional, as to that particular company at least, in that it imposed a burden upon interstate commerce and had the effect of taxing property in other states. The equal protection clause, the interstate commerce clause and the due process clause of the Federal Constitution were all raised by the record in that case. The Court might have rested its decision solely upon the ground that the statute violated the equal protection clause, but all three grounds were presented and argued and this Court held the statute invalid as violating each of said clauses.

We take it that it is not necessary, because the language is so clear and that the case has been decided so recently, by this Court, to argue before the Court the scope and meaning of its own decision. The members of the Bar of Illinois, and including the former Assistant Attorney-General, who had charge of this litigation, during his term of office, for the State of Illinois, are very generally of the opinion that the *Airway case* is decisive as to the validity of the Illinois statute. We shall endeavor to answer *seriatim* the points raised in our opponents' brief.

Referring to his statement of the case and Point I of his brief and argument, we would say that the history of the Franchise Tax legislation of Illinois is correctly set forth by him. We take it, however, that a successive legislative

body is not competent to state what the preceding legislature meant when it enacted a certain statute. The fact is that the Franchise Tax Law, in approximately its present form, was first incorporated in the Act in 1919 and the law did not, at that time, impose the arbitrary valuation clause upon non-par corporations, so far as their annual tax was concerned. It did use this arbitrary valuation clause in connection with the initial fee of domestic corporations and the entrance fee of foreign corporations and in fixing the minimum fee of both domestic and foreign corporations.

One of the cases cited by our opponent, under his first point is the case of the *American Uniform Co.* v. *Commonwealth*, 237 Mass. 42. This case did involve a similar tax to that involved in the case at bar. The Court, in that case, recognized that the arbitrary valuation clause, in their statute, necessarily resulted in inequality. It, however, sustained the law largely upon the practical ground that it was a perplexing problem and that the tax, in any event, was not onerous, since there was a maximum limit of $2,500 fixed by the statute. In Illinois there is no maximum. Many corporations are required to pay enormous taxes; a few as high as $30,000 and $50,000 a year. Massachusetts shortly after repealed this law and their more recent Franchise Tax Law came before this Court in the case of the *Alfa Portland Cement Co.* v. *Mass.*, 268 U. S. 203, at 218, in which case this Court declared the statute invalid because it created a burden on interstate commerce. The statute involved in the *American Uniform Co. case* was never brought before this Court, with reference to the non-par arbitrary valuation clause.

The two Arkansas cases against the two oil corporations, reported in 269 S. W. 63, do involve a very similar statute. The statute in Arkansas, however, bases the tax not upon the authorized but upon the subscribed, issued and outstanding shares. The Arkansas Court, moreover, relied upon the de-

cision of the Illinois Supreme Court, which is called in que tion in the case at bar. That the statute there taxed u equally members of the same class is admitted by the opinio The reason given that the corporation chooses the kind shares it shall have is not sufficient. The constitution r stricts the power of the Legislature. While a state mig exclude or refuse to create corporations with non-par share it must tax them equally if it does permit them to become pe sons within the state, because the Federal Constitution so r quires.

Both opposing counsel and the Arkansas Supreme Cou rely on *Detroit Mortgage Corp.* v. *Secretary*, 211 Mich. 32 This decision, when analyzed, holds that a state must ta foreign corporations within the state in accordance with th provisions of the statute of the state which incorporated i This proposition of law is clearly unsound. The case o *Staples* v. *Kirby Petroleum Co.*, 250 S. W. 293 (Tex. Ci App. 1923), lays down a much sounder rule, which rule i that the taxing state is not bound by the tax laws of the in corporating state. The decision on both sides of this poin are reviewed in the *Staples case*. The question of taxin non-par shares at an arbitrary rate was only incidentally in volved in the *Detroit* and the *Staples cases*.

The remaining arguments, under this point of our op ponent's brief are more properly addressed to the Legis lature than to the Court. The non-par share and non-pa certificate, are representations of the actual facts whereas the par value share and certificate are the representations o a set of facts which at best existed only at the moment of in corporation. The fact that difficulties have arisen, follow ing the adoption of non-par shares has not deducted from its very clear advantages to the business world and this is evidenced by the fact that in every session of the Legislature some new state adopts this feature into its corporation law

until, at present, there are thirty-nine states authorizing the use of non-par shares.

Under the second point in his brief, counsel undertakes to distinguish the cases cited under the first point of our original brief. We do not believe it necessary to refer, again, to these cases, since we believe that they were set forth in sufficient clearness in our original brief. The cases toward the end of this point, which we did not abstract, in our original brief, were cited because they are well known cases that stand for the broad general proposition that although the Legislature may classify and tax members of the various classifications differently, they must, nevertheless, have a reasonable basis for the classification. In many of the cases there cited, the Court sustained the particular classification involved therein. In cases where the same principle was applied and the facts were similar to those in the case at bar, we undertook to analyze and digest the decision, for the benefit of the Court. The cases cited under Point I of our brief, are admittedly not cases of the application of the rule therein set forth to corporations. They were cited as setting forth the rule that taxation must be equal as between members of the same class.

Under the third heading of our opponent's brief, we find a large number of cases, each of which involves the question as to whether the particular statute in that case was invalid because it imposed a burden on interstate commerce. There is no apparent object or reason for the citation of these cases, since opposing counsel claims and we admit that the case at bar does not raise the interstate commerce question. There are, of course, many cases arising under this statute in which corporations which are engaged in interstate commerce and which are affected exactly as the corporation in the *Airway case* was affected. Doubtless some of these cases will reach this Court on that point unless the law is declared unconstitutional in this case.

We cannot take serious exception to counsel's statement, referring to the third heading of our principal brief. We admit that all of the authorized capital stock of this company was issued, but we felt justified in calling the attention of the Court, however, to the fact that the Illinois statute is based on the amount of authorized capital stock, instead of the amount of paid in capital stock because the inequalities created by that basis are almost identical, in their character, with the inequalities created by the arbitrary valuation clause. We did not contend, under our point, and do not now contend, that this corporation is injured by the provision basing the tax upon the authorized shares.

We found, in briefing the subject, that a discussion of both of these factors tended to clarify each. The arbitrary valuation of non-par value shares itself creates such glaring inequalities, and the difference between corporations having par value shares and those having no par value shares is so fictitious that the law necessarily violate the equal protection clause of the 14th Amendment. We believe that the law is also bad, regardless of the arbitrary valuation clause, because it is based upon the authorized capital stock. This basis, itself, necessarily results in inequality. We do not claim that the facts in this case show an injury to this corporation from this source. We also believe the Illinois law, in certain cases, imposes a burden upon interstate commerce, but we do not contend that it does in this case.

Counsel inadvertently stated that this Court had upheld the statute of Illinois in the case of the *Hump Hairpin Mfg. Co.* v. *Emmerson,* 258 U. S. 290. This Court did uphold a similar statute of Illinois, in that case, but not the statute involved here. This statute was passed in 1919 and the *Hump case* involved the taxes imposed in the year 1918 under an older statute. The *Hump case* involved the question as to whether, under the facts therein, a burden was imposed upon the interstate commerce of the complainant corpora-

tion and the Court held that no such burden was imposed by the statute in its application to the case of that particular corporation. We do not contend that the Franchise Tax is an advalorem property tax, nor do we say that it must necessarily be measured by the assets of the corporation allocated to Illinois. We did contend, in our brief, that that would be a reasonable method of determination and that such a method would result in substantial equality. We do contend, however, that whether a tax is an excise tax or a property tax that it must produce substantial equality in taxation, between members of the same class, subject to the tax.

Under the fourth heading of our opponent's brief, we note that he has set forth arguments to the effect that the state can properly amend its statute and change the tax imposed. We make no claim that it cannot do this. The point raised under the corresponding heading in our brief was that the Supreme Court of Illinois had fixed a rule of law, defining the meaning of capital stock. This definition was in substance that the capital stock of a company was the amount paid in or required to be paid in, as working capital, to secure the issuance of part or all of the shares of capital stock. This rule or definition was the fixed law of the state of Illinois for many years, prior to June, 1921. See *Slater* v. *Taylor,* 241 Ill. 102; 89 N. E. 271, at 272. The plaintiff corporation, in this case made the amendment of June, 1921, to its charter, in reliance upon that rule of law. That rule of law was reiterated in the *Armstrong case,* 300 Ill. 54 at 58 (October, 1921) and *People ex rel. Roberts & Schaefer Company* v. *Emmerson,* 305 Ill. 348 (October. 1922), but was changed and reversed by the Supreme Court of Illinois in the case at bar.

In conclusion, we beg leave to summarize the arguments advanced by plaintiff corporation against the validity of the Illinois Franchise Tax Law, as follows:

First. The law, so far as it imposes the arbitrary valuation upon non-par value shares, has no tendency to produce substantial equality among corporations subject to the tax.

Second. A classification of corporations into par value and non-par value corporations, and a reclassification of non-par valuation corporations into numerous sub-classes, dependent upon the number of non-par value shares authorized, are classifications which are purely arbitrary and fictitious.

Third. To fix the amount of the authorized capital stock as the basis for determining the amount of the tax, has no tendency to produce substantial equality, but results in grossly unequal taxes.

Fourth. The change in the rule of law applicable to the contract herein involved impairs the validity of the charter contract of the plaintiff corporation.

All of which is respectfully submitted.

PAUL O'DONNELL,
CHARLES W. PALTZER,
Solicitors for Plaintiff in Error.

NO. 210 (30706)

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OCTOBER TERM, A. D. 1925.

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PLAINTIFF IN ERROR,

v.

LOUIS L. EMMERSON, as Secretary of State of the State of Illinois,
DEFENDANT IN ERROR.

ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

BRIEF AND ARGUMENT FOR DEFENDANT IN ERROR.

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Solicitors for Defendant in Error intend to argue this case orally.

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LOUIS L. EMMERSON, as Secretary of State of the State of Illinois,
DEFENDANT IN ERROR.

ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

BRIEF AND ARGUMENT FOR DEFENDANT IN ERROR.

STATEMENT OF THE CASE.

MAY IT PLEASE THE COURT:

The opinion and decision of the Supreme Court of Illinois in this case is reported in *Roberts & Schaefer Co.* v. *Emmerson*, 313 Ill., 137. The opinion of that court is also set forth in the transcript of the record herein at pages 45-53.

On June 12, 1923, the plaintiff corporation filed its suit in the Circuit Court of Sangamon County, Illinois,

to compel the defendant Secretary of State to accept the sum of $200 or a portion thereof in payment of its annual license fee or franchise tax for the year commencing July 1, 1923. The defendant filed a demurrer to the bill of complaint and upon the hearing the Circuit Court sustained the demurrer and dismissed the bill. The plaintiff thereupon appealed to the Supreme Court of Illinois, which affirmed the decree of the lower court on June 17, 1924. The plaintiff thereafter sued out a writ of error from this court to review said judgment. (R. 1-10, 45-53, 75-80.)

The plaintiff is a domestic corporation, which was organized under the laws of the State of Illinois with an authorized capital stock of 1,000 shares of the par value of $100 each, amounting to $100,000. In June, 1921, the plaintiff amended its charter by changing such shares of stock into preferred stock of the same par value, and by issuing 10,000 shares of common stock with no par value, but which the amendment provided should be fully paid up and non-assessable upon the payment of $5 per share in cash or property, as determined by its board of directors. (R. 1.)

After issuing this new stock without par value, plaintiff filed a certificate of such amendment with the defendant Secretary of State and afterwards, in February, 1922, the plaintiff also filed its annual report for the purpose of having its annual license fee or franchise tax assessed

for that year. Section 105 of the General Corporation Act did not then contain the provision that such stock should be considered to be of the par value of $100 per share for the purpose of making such assessment. The plaintiff therefore contended that it could be assessed only the minimum tax under a similar provision in Section 107 of said Act, but the Secretary of State computed its tax on that basis as $550 under said Section 105.

The plaintiff thereupon filed its petition for mandamus to compel the Secretary of State to accept the sum of $200 tendered by it as the minimum fee under said Section 107. The Supreme Court of Illinois held that, as said Section 105 did not then contain such a valuation provision for stock of no par value, such tax could not be computed on that basis under that section, but that the minimum tax should be assessed under such provision in Section 107. (*People ex rel. Roberts & Schaefer Co.* v. *Emmerson,* 305 Ill., 348.)

Following this decision, by an amendment effective May 3, 1923, the Legislature of Illinois amended said Section 105 by adding the provision that, "In the event the corporation has stock of no par value, its shares, for the purpose of fixing such fee, shall be considered to be of the par value of $100 per share." Section 2 of this amendment recited that at the time of the passage of said General Corporation Act of 1919, conferring upon corporations the privilege of having shares without par

value, it was the intent of the Legislature that in all cases such corporations should pay for such privilege the same amount of initial fees and franchise taxes as though such shares were of the par value of $100; that under the decision of the Supreme Court the Secretary of State would be unable to collect large sums of money from corporations to which the State is justly entitled, and that all franchise tax provisions of said Act were in danger of being invalidated unless such omission was remedied; therefore, it was declared that an emergency existed and that said Act should take effect at once. (R. 4; Session Laws of Illinois, 1923, p. 280.)

The plaintiff thereupon filed its bill of complaint herein and charged that this amendment is void in that it violates Section 1 of Article IX of the Constitution of Illinois, which provides that a tax on persons or corporations owning or using franchises and privileges shall be uniform as to the class upon which it operates; and, also, that said amendment violates the equal protection clause of the Fourteenth Amendment to the Federal Constitution. (R. 4-5.)

The bill further stated that the annual franchise tax due from the plaintiff was $200, having regard to the minimum provisions of Sections 105 and 107 of said General Corporation Act, but that the defendant Secretary of State had assessed said tax in the sum of $550, by considering said 10,000 shares of no par value stock to be of

the value of $100 per share for the purpose of assessing such tax, and had demanded the payment of said amount so assessed; that the valuation provision in said Section 107 was also void, and that except for such provision the plaintiff's franchise tax would be $75, or that it would be $200, having regard to the minimum provisions, and that plaintiff had tendered and offered to pay that amount or any part thereof, but that the defendant had refused to accept it. The bill prayed that he be required to accept said amount or the proper portion thereof, or be enjoined from collecting any larger amount. (R. 5-8.)

The demurrer of the defendant to the bill of complaint admitted the material facts pleaded but did not admit the argument and conclusions of law set forth in the bill. The Circuit Court so held and entered a decree dismissing the bill. Upon the appeal to the Supreme Court of Illinois, that court first held that the decree should be reversed, on the assumption that Section 4 of the General Corporation Act required the total amount of capital stock of a corporation to be stated in money in the articles of incorporation or amendment thereto, and thereby fixed a par value in fact for stock without par value as a basis for taxation. Upon a rehearing, however, that court found and held that the money value of such stock or capital represented by it need not be stated in the articles of incorporation or any amendment thereto, but that the amount for which such stock may be issued and sold may be thereafter fixed and determined by the board

of directors of the corporation under Section 32 of said Act, and that it therefore became necessary to place a valuation on such stock as a basis for assessing franchise taxes; that the nature and uses of such stock justified the legislature in placing a valuation upon it for the purpose of computing the franchise taxes which corporations should pay for the privilege of having such stock, and that such valuation did not violate any provision of the State or Federal Constitution. (*Roberts & Schaefer Co.* v. *Emmerson,* 313 Ill. 137.)

The petition for the writ of error herein states that the bill of complaint alleged that said valuation provision in Sections 105 and 107 of the General Corporation Act of Illinois violated the Fourteenth Amendment to the Federal Constitution; that the sole question raised by the pleadings in said cause was the constitutionality of said two clauses, and that on appeal to the Supreme Court of Illinois the plaintiff assigned as error the refusal of the lower court to hold said clauses in said two sections unconstitutional and void, and that such contentions were presented and argued by it but were decided against it by that court; that said suit also involved the validity of a contract and that claim was made by it before final judgment that a change in the rule of law or construction of a statute by the Supreme Court of Illinois applicable to said contract was repugnant to the Constitution of the United States, but that the court decided against such claim. (R. 75-77.)

The plaintiff has assigned three alleged errors in this court. The first assignment apparently seeks to apply the decision of the Supreme Court of Illinois to all of Sections 105 and 107 of the General Corporation Act of that state; whereas, such decision applied only to the provision in said sections for the valuation of stock of no par value, which the plaintiff's bill alleged to be invalid. The second and third assignments seek to raise the question of the impairment of a contract by the decision of the Supreme Court of Illinois, contrary to Article I, Section 10, of the Constitution of the United States, which question was not raised or presented in any manner by the plaintiff's bill of complaint. (R. 77-8.)

The several sections of the General Corporation Act of Illinois, which are deemed to be relevant to the issues involved in this case, are set out in an appendix to this brief, at pages 57-59.

BRIEF AND ARGUMENT.

I.

The provision of the Illinois Corporation Act that for the purpose of fixing the Annual License Fee or Franchise Tax of a corporation, its stock without par value shall be considered to be of the par value of $100 per share, is a reasonable rule or classification and does not violate the equal protection clause of the Fourteenth Amendment.

Roberts & Schaefer Co. v. *Emmerson,* 313 Ill., 137;
American Uniform Co. v. *Commonwealth,* 237 Mass., 42;
Detroit Mortgage Corp. v. *Secretary of State,* 211 Mich., 320.
State v. *Margay Oil Corp.,* 269 S. W. (Ark.), 63;
Stewart v. *Brady,* 300 Ill., 425;
Lindsley v. *Natural Carbonic Gas Co.,* 220 U. S., 61;
District of Columbia v. *Brooke,* 214 U. S., 138, 150;
International Harvester Co. v. *Missouri,* 234 U. S., 199;
Ozan Lumber Co. v. *Union County Bank,* 207 U. S., 251;
Engel v. *O'Malley,* 219 U. S., 128;
Mutual Loan Co. v. *Martel,* 222 U. S., 225;
Mo., Kan. & Tex. Ry. Co. v. *May,* 194 U. S., 267, 269;
Watson v. *Maryland,* 218 U. S., 173, 179.
Baltic Mining Co. v. *Massachusetts,* 231 U. S., 68;
Cheney Bros. Co. v. *Massachusetts,* 246 U. S., 147;
Cook on Corporations, 8th Ed., 1923, Vol. 1, Chap. 3, p. 291.

The General Corporation Act of Illinois became effective on July 1, 1919. This Act was a complete revision of the law of this State in relation to corporations for pecuniary profit. Prior to the passage of that Act, there was no provision in the Illinois Law for any corporation to have capital stock without par value (Smith-Hurd's Ill. Rev. Stats., 1925, Chap. 32, Secs. 1-158).

Sections 96 and 101 of that Act, which fixed the initial fees to be paid upon the organization of domestic corporations and the admission of foreign corporations, respectively, provided that if any such corporation had stock without par value, it shares, for the purpose of fixing such fees, shall be considered to be of the par value of $100 per share. Section 107 of the Act contained a similar provision for assessing the annual license fee or franchise tax on corporations having no tangible property in this State (Appendix p. 58).

The case of *People ex rel Roberts & Schaefer Co.* v. *Emmerson,* 305 Ill., 348, which was decided prior to the amendment of 1923, first presented to the Supreme Court of this State the question whether the annual franchise tax assessed against a corporation having stock of no par value, should be computed on a valuation of $100 per share, under Section 105 of that Act. The State Supreme Court held that inasmuch as no provision for such valuation was then contained in that section, the annual license fee could not be computed on that basis under that

section, but the minimum fee was there assessed under such a provision in Section 107 of the Act.

Following this decision, the Illinois Legislature passed the Act approved May 3, 1923, whereby the provision was added to Section 105 that in the event the corporation had stock of no par value, its shares, for the purpose of fixing such fee, shall be considered to be of the par value of $100 per share (R. 3). This amendment expressly states that it was the intent of the Legislature at the time of passing the General Corporation Act, as a prerequisite to the right of corporations to have shares without par value, that in all cases such corporations should pay for such privilege the same amount of initial fees and franchise taxes as though such shares were of the par value of $100 per share (R. 4; Session Laws of Illinois, 1923, p. 280).

The question of the validity of this amendment was at once raised by the plaintiff in this case, by filing its bill of complaint in the Circuit Court of this state, on the ground that the amendment violated the uniform provision of the state constitution and the equal protection clause of the Fourteenth Amendment to the Federal Constitution. Upon the appeal to the State Supreme Court, the plaintiff also urged that the amendment violated the due process provision and impaired is rights under its charter.

After a full consideration of the provisions of the statute and the questions involved, that Court held in a well reasoned opinion by Mr. Chief Justice Carter, that this valuation provision was necessary for the purpose of computing the annual license fee on stock of no par value, in the same manner that the tax is computed on stock with a par value, and that such provision did not violate any of the constitutional provisions above mentioned (R. 45-53; *Roberts & Schaefer Co.* v. *Emmerson,* 313 Ill., 137).

In considering the issues involved, the Court showed that the statute does not require corporations to place a specific valuation upon stock without par value, which if required would in effect abolish such stock; that in authorizing corporations to have such stock, the Legislature determined that a definite valuation should be placed upon it for the purpose of computing franchise taxes; that there is a clear distinction between the two classes of authorized shares, and the Court quoted from its prior decision in *Stewart* v. *Brady,* 300 Ill., 425, with respect to the legislative power of classification in such cases as follows:

> "Its classifications of the objects of legislation is not required to be scientific, logical or consistent, if it is reasonably adapted to secure the purpose for which it is intended and is not purely arbitrary. Legislative classification does not have to be so broad and comprehensive as to include all the evils which might by possibility be brought within its terms.

> Classification must be accommodated to the problems of legislation and must be palpably arbitrary to authorize a judicial review of it. It cannot be disturbed by the courts unless they can see clearly that there is no fair reason for the law that would not require with equal force its extension to others whom it leaves untouched.' We further said at page 436 of the same case: 'One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary. A distinction in legislation is not arbitrary if any state of facts can be conceived that would sustain it, and the existence of that state of facts at the time the law was enacted must be assumed. (*Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S., 61.) It makes no difference that the facts may be disputed or their effect opposed by argument and opinion of serious strength.' "

The Court further held that there is a sufficient difference between par value stock and no par value stock to authorize a definite basis of valuation in computing the franchise taxes of corporations having no par value stock; that the Legislature had provided in substance that corporations desiring to use such stock shall make it of such value, in actuality, as to bear a franchise tax computed on a valuation of $100, or if not of such value, that the corporation shall bear that tax as one of the burdens of exercising the privilege of using such stock; that the rules of valuation fixed by said act, as amended in 1923, are proper and apply uniformly to all no par value stock; that such classification is reasonable and

proper, and moreover is substantially necessary to the determination of fees and franchise taxes (R. 52-3; 313 Ill., 137, 149).

The Court stated that this view was supported by the decision in *American Uniform Co.* v. *Commonwealth,* 237 Mass., 42, and quoted from the opinion in that case, at page 150, as follows:

> "Corporations with capital stock of a par value afford an easy measure for the computation of the excise. There is no such ready-at-hand measure for the computation of the excise upon corporations having capital stock without par value. Some excise must be exacted from them in fairness to other foreign corporations. The latter would have just ground for complaint if they were exempted. It cannot be deemed oppressive to enact a general rule as to all such corporations that the excise shall be measured by the par value which most frequently prevails in corporations whose stock has a par value."

The Court also said that this view was supported by some of the language used in the opinion in *Detroit Mortgage Corp.* v. *Secretary of State,* 211 Mich., 320, but stated that the case of *People* v. *Mensching,* 187 N. Y., 8, was not regarded as authority upon the point in issue, as that case involved a stock transfer tax which was fixed at the same sum on each share of stock, regardless of its face value, which required stock of different face values to be taxed at the same amount. It was further said that the case of *People* v. *Walsh,* 195 N. Y. Supp., 184,

was not necessarily opposed to the view taken, as the tax in that case was based upon capital invested, on which the value could be readily determined.

The decision in the case of *American Uniform Co.* v. *Commonwealth,* 237 Mass., 42, is directly in point here. That case involved the right of the State to impose an annual license fee or excise tax upon the authorized capital stock of foreign corporations transacting a local business in that State. The statute under which the question arose provided that every foreign corporation should pay an annual excise tax of one-fiftieth of one per cent of the par value of its authorized capital stock, not to exceed two thousand dollars; "provided, that for the purpose of assessing the excise upon corporations whose stock was issued without a par value one hundred dollars shall be considered par."

The Court there stated that in the case of stock with a par value, the excise was simply measured by the par value of the shares. The actual value or market value of the stock was of no consequence. In the case of two corporations with the same amount of capital stock, one might be on the verge of bankruptcy and its stock valueless, while the other might be highly prosperous and its stock be worth double its par value, but both would pay the same excise tax under the law. The reason stated for this was that the tax is an excise and not a property tax. It stands on the same footing in principle in this respect

as most license taxes. The Court in that case further said that before the provision above quoted was added, the statute made no express provision touching those corporations which had stock without par value. It became necessary to provide for the excise to be exacted from this class of corporations, and in discussing this question the Court said:

> "It was a practical legislative question how to deal with a somewhat perplexing problem. It would have been unfair to other corporations, the actual value of whose stock is less than par, to establish the actual value of the stock of this class of corporations, as the measure of the excise. Moreover, to pursue that course would have similitude to a property tax rather than an excise. It would be open to attack on the constitutional ground that it was an attempt to tax property outside the state, a ground held fatal in *International Paper Co.* v. *Massachusetts.*, 246 U. S., 135. It is common knowledge that the par value of the shares of very many business corporations is $100 each. It well may be that the General Court had definite knowledge as to the facts in this particular. At any rate it was its duty to adopt some measure for the excise to be charged against such corporations, reasonably fair to them as compared with the excise levied on other foreign corporations."

The Court stated there was nothing in the statute which conflicted with the Fourteenth Amendment to the Federal Constitution, and referred to the case of *District of Columbia* v. *Brooke*, 214 U. S., 138, 150, which held that this amendment did not take from the State the power of

classification, and that a wide range of discretion is necessary to make it practical, and further said:

> "That principle thus stated seems to us to govern the case at bar. The present tax is not a property tax and is not regulative of interstate commerce. *Baltic Mining Co.* v. *Mass.*, 231 U. S. 68. It is not discriminatory or unequal in the sense of denying to the petitioner the protection of equal laws. Absolute equality is impossible even in the operation of laws for the taxation of property. It is even more difficult to arrive at exact uniformity in the operation of excise laws. That is not required by the Constitution. It is enough if they are not unreasonable in the light of all the conditions to which they are likely to apply. The present statute applies evenly to all foreign corporations seeking to avail themselves of the privilege of doing a domestic business within the borders of Massachusetts and having capital stock without par value. Its design is to put the corporations having stock without par value as nearly as may be on the same footing touching excises as those having capital stock with a par value. The petitioner is not singled out as a special object for hostile or discriminating legislation. It is not easy to perceive any more equitable way of dealing with a somewhat puzzling and difficult question than that adopted by the legislature. In any event we think it cannot be said that this statute is unequal in its operation, or that it deprives the plaintiff of its property without due process of law."

The reasoning in the case of *Detroit Mortgage Corp.* v. *Secretary of State*, 211 Mich., 320, is applicable here. That was a corporation organized under the laws of the State of Delaware, with preferred and common stock with a par value, but by amendment its common stock was

changed to stock with no par value, as was done by plaintiff in this case. The laws of Delaware, like our statute, provided that stock with no par value should be considered as having a par value of $100 per share for the purpose of assessing franchise taxes by that State. The Michigan statute provided for a franchise tax on foreign corporations based on the proportion of the authorized capital stock represented by its tangible property in that State, but had no provision applicable to stock without a par value. The Secretary of State therefore considered that the stock should be valued at $100 per share, as provided by the Delaware statute, for the purpose of computing the Michigan franchise tax. In discussing the law applicable to the stock of that corporation, the Court said, at page 325:

> "The State of Delaware could prescribe the terms and conditions under which corporations might be therein organized. Such terms and conditions as it saw fit to prescribe regulated and controlled such corporations and became in effect a part of their charters. When by the provisions of the act of the legislature of that state corporations were permitted to issue stock with no par value, there was coupled with such right a proviso that for the purpose of franchise taxes such stock should be taken to be of the par value of $100 each. This provision was as effectively a part of the corporation's charter as though written therein."
>
> "In the instant case the plaintiff, when originally incorporated in Delaware, fixed the par value of its common stock at $10 per share; upon that par value it paid its franchise fee to the State. When it amended its articles of association to take advantage

of the act of the Delaware legislature of 1917, it took with the advantages such disadvantages as the act itself imposed. One of these disadvantages was fixing a value for taxation purposes of $100 per share."

The recent decision of the Supreme Court of Arkansas, in the consolidated cases of *State* v. *Margay Oil Corporation,* and *State* v. *Enfisco Oil Corporation,* 269 S. W. (Ark.) 63, upheld the Act of 1923, of that State, which provided that for the purpose of franchise taxes prescribed by law to be paid by corporations to the State, but for no other purpose, shares of stock of no par value should be taken to be of the par value of $25 each. The corporations in those cases had been organized under the laws of Delaware with stock having no par value and had entered that State several years previously and paid franchise taxes until 1923, when a controversy arose over the basis of the taxes assessed by the tax commission under said new Act. In passing upon that question, the Court said:

"The power of the State to make reasonable classifications for the purposes of regulation or of taxation has often been decided and never denied, and such classifications will not be overturned by the Court if all corporations of the same class are treated alike (citing cases). The Statute under consideration applies equally to all corporations organized on the same basis, both domestic and foreign, that is to say, corporations with non par value stock. It may be true, as urged by counsel for appellees, and as shown by illustrations in the brief, that the Statute may work a difference in the

amount of tax as between corporations having the same amount of assets, but this argument is answered by the fact that a corporation may choose for itself whether it shall or shall not bring itself within the terms of the Statute. It is a voluntary act of the corporation in accepting the statutory basis of par value, rather than to express a value in the face of the certificate. Such statutes are not uncommon, but on the contrary, are in vogue in a great many of the states, such statutes generally prescribing a par value of $100. Similar statutes have been upheld in Michigan and Illinois. *Detroit Mortgage Corporation* v. *Secretary of State,* 211 Mich., 320, 178 N. W. 697; *Roberts & Schaefer Co.* v. *Emmerson,* 313 Ill., 137, 144 N. E. 818. Our statute, however, fixes the value at $25, which is the par value of stock of corporations organized under general statute. It is not without interest to note that in the State of Delaware, where both of these corporations are organized, there is a statute fixing the value of non par value stock at $100."

Statutes permitting corporations to have stock without par value are of comparatively recent origin. New York was the first state to enact such a law in 1912, after a campaign for that purpose had been carried on for several years and a similar Act had been vetoed by Governor Hughes, Chas. E. This movement was afterwards extended to other states, many of which have now adopted similar acts, and practically all of them permit business to be carried on in them by corporations having such stock. Most of them impose a franchise tax on corporations having such stock at a valuation of $100 per share.

Congress also has recognized such stock and imposed a tax on the same basis (Par. 800, 40 Stat. 319).

It is generally agreed that the real purpose and effect of providing that corporations may issue stock without par value is implied in the phrase *"caveat emptor"*; that is to say, "let the buyer beware," and "let the creditor beware." It is said by the advocates of such stock that it puts investors and creditors on notice and requires them to inform themselves of the value of the assets and business of corporations, instead of relying upon the par value of their capital stock. It is also said that such stock is used to eliminate the danger of stockholders' liability when stock is issued at the market value or for considerations which might leave the stockholder subject to further liability, if par value stock were issued. (Corporation Trust Company of New York, "Shares Without Par Value", January 1, 1926).

In a circular issued by the Corporation Trust Company of Delaware, relative to the Delaware Statute of 1917, authorizing the issue of stock without par value, it was said:

> "Stock without par value can be issued full paid in any desired amount for contracts, patents, mines, oil leases, services and similar considerations whose real value generally cannot be accurately estimated. The operation is merely an exchange of property for shares without any dollar mark of value being placed upon the property or the shares and it is not open to question. *It insures future stockholders ab-*

solutely against liability based on over-valuation of assets."

The nature and uses of stock without par value are such that it has been condemned in strong terms by some corporation authorities and others who have considered the subject. It is said that while such stock may be used in the interest of promotors, its use is contrary to the best interests of investors and creditors of corporations. In the last edition of Cook on Corporations, (8th Ed., 1923), Vol. 1, Chapter III, on "Watered" Stock, page 291, the author discusses this subject as follows:

> Par. 45d. *Remedy of stock without par value:* We now come to the most peculiar remedy of all, namely, the issue of stock without any par value whatsoever. This can hardly be called a remedy. It is quite the reverse. It legalizes instead of restricting large issues of stock for property. The theory of this recent innovation is that the American public should be educated up to the idea that a share of stock represents but a proportion of the corporate property. The American public, however, is incurably imbued with the idea that a share of stock represents or should represent a fixed sum, instead of the imagination or machinations of promoters. As a matter of fact, the public generally has no definite idea of the value of property turned in for stock, and hence if unlimited stock be issued for all kinds of property, the danger of fraud is greatly increased. Unreliable men may issue stock without par value to an amount limited only by their capacity to induce the public to buy it. It is of course safer for promoters to issue stock without par value for choice assortments of property, but how the investors and the public benefit has not as yet appeared. Preferred

stock of no par value is sometimes issued at a low figure and yet with a preference not only as to dividends but of $100 per share on dissolution. This adds a gambling feature, but does not add to the usefulness and standing of corporations. It is to be borne in mind that the corporation is the greatest instrument of modern industrial progress. It gathers the surplus funds of millions for enterprises involving billions. That which tends to discredit it is not for the public good. Blue-Sky Laws check watered stock; stock with no par value has an opposite effect. Stock with no par value renders possible watered stock with no liability. The hundreds of cases in this chapter involved corporations which pretended to have a capital, which they had not. Stock without par value practically requires no capital and hence may prevent such suits, but it puts a premium on doing business without capital and without liability. That proposition is almost a fraud in itself. Blue-Sky Laws may be some check on stock of no par value, but it will be difficult to put a value on that which has no fixed value of its own. As an eminent judge wrote the author 'Stock without par value is at most certain to amplify the frauds through corporations, already sufficiently extensive.' Stock without par value adds to the mystery as to what the stock really represents, and the public still compares the market price of such stock with $100 par, without regard to whether or not the stock is without par value. Even the courts in construing these new statutes do so in that frame of mind. Various decisions on the workings of this new device are given in the notes below. It appears that under the New York statute some value has to be given and so the certificate of incorporation, if stock without par value is issued, must state the issue price of at least $5 per share. It is fraud to sell stock without

> par value in another state, without compliance with the Blue-Sky Laws of the latter state, and the money may be recovered back even in a third State."

The Supreme Court of Illinois has held in this case that the General Corporation Act of this state requires corporations to state in their articles of incorporation or amendment thereto the number of shares of capital stock and whether all or part of it shall have a par value and if so, the par value thereof, but no value or price is required to be fixed for stock without par value. Therefore, corporations having stock without par value may fix the consideration or price at which such stock may be issued from time to time and may change the consideration or price therefor as they may see fit (*Roberts & Schaefer Co.* v. *Emmerson,* 313 Ill., 137, 140).

One of the chief difficulties in dealing with corporations having stock without par value is found in applying organization and franchise fees or taxes to such corporations. Many states have based such fees or taxes on the par value of capital stock. This has been done as a matter of necessity or convenience in fixing such taxes, although the par value of such stock usually does not represent its true value. Most of the states which have provided for stock without par value, for the same reason, have fixed a valuation on such stock for the purpose of taxation, at $100 per share, or the amount usually provided for par value stock. Some states require the certificate of incorporation to indicate only the number

of shares authorized, without fixing the amount of capital represented by them. Where such shares are issued for intangible assets or property on which no value is fixed, there is no means of ascertaining the value or amount in money for which such stock is actually issued.

In view of the special uses which may be made of stock without par value and the immunity from liability of subscribers for such stock, the several states clearly had the right to prohibit the use of such stock by corporations organized or admitted to do business therein, or to provide that if corporations have such stock, it shall have a valuation of $100 per share for the purpose of assessing franchise taxes, although it may be actually issued for a greater or less amount or without any price being fixed therefor. This rule merely places such stock on the same basis as stock having a par value of the same amount for the purposes of taxation, and is an approximation of equality between corporations having the two classes of stock.

If this is considered a different basis for fixing franchise taxes on corporations having stock with no par value from that applied to par value stock, then such difference is justified by the distinctive uses and advantages of stock without par value. The state has the right to prohibit the use of such stock entirely, or to impose such terms and conditions on corporations using such stock as may be deemed commensurate with the privileges enjoyed

by them, or as may discourage them generally from using such stock to any great extent.

II.

Sections 105 and 107 of the General Corporation Act of Illinois place all corporations having stock without par value in the same class and impose a tax on such corporations on the same basis provided for corporations having stock with a par value of $100 per share, and do not classify such corporations according to the mere number of their shares of stock without par value, or without any reasonable relation to the nature and uses of such stock.

Smith-Hurd's Ill. Rev. Stats., 1925, Chap. 32, Secs. 105, 107;
Authorities cited under Point I, *supra;*
Authorities cited in plaintiff's brief, Points II and III, distinguished.

The plaintiff assumes in its statement and argument herein that the consideration received by a corporation for its capital stock without par value fixes the money value of such stock, and that a license fee or franchise tax should be based upon such valuation. The effect of such a rule would destroy the theory or principle of stock without par value, as it would fix the average or par value of each share of such stock and thus make it practically the same as par value stock.

In all cases where stock without par value is issued for property and especially for intangible rights and interests the exact value is not determined and usually

cannot be fixed with certainty at the time such stock is issued. The theory on which such stock is recommended is that the value or amount in money for which it is issued need not be fixed or determined, but that such stock may be merely exchanged for property and interests, without any valuation or price being placed thereon.

The plaintiff's bill of complaint showed that its capital stock consisted of 1,000 shares of preferred stock of the par value of $100 each, amounting to $100,000, and 10,000 shares of common stock without par value, which the amendment provided should be "fully paid up and non-assessable upon the payment of $5 for each share, in cash or property as may be determined by the Board of Directors" (R. 1.).

The Illinois Corporation Act did not require the amount for which stock without par value might be issued to be fixed in the articles of incorporation or amendment thereto, and where such stock might be issued in exchange for property or intangible interests, as in this case, the exact or true value of the consideration might never be ascertained or determined.

Even if the consideration received for this stock was in fact $5 in cash or property, that amount would not fix the actual value of such stock. The real value would be determined by the extent to which it would share in the earnings and assets of the corporation. Such stock would control the corporation and might profit to an equal or

greater extent than the preferred stock and thus be equal to it in value or of even having greater value than such stock.

It therefore appears that the allegation in the bill of complaint that plaintiff's capital stock consisted of $150,000 is a mere conclusion which results from placing a valuation of $50,000 on 10,000 shares of stock without par value, in addition to the $100,000 fixed for the par value stock. This conclusion was not justified as a matter of law or fact, and was not admitted by the demurrer of the defendant to the bill of complaint.

The further assumption of the plaintiff that the Act does not tax equally or uniformly corporations having stock without par value is also based upon the theory that such stock must in fact have the value fixed for its issue, even though it may be issued in exchange for property or interests of which the real value may not and cannot be fixed or determined. As before stated, this theory would in effect require a par or average value to be fixed for all stock without par value and would destroy the distinctive quality of such stock and the special uses and advantages which it is supposed to have as compared with par value stock.

When the rule provided by Sections 105 and 107 of the Illinois Corporation Act is applied, there is no inequality between corporations having stock without par value, but they are assessed alike on the basis of $100 per

share for such stock, the same as corporations having stock with a par value of that amount. There is no uncertainty or ambiguity in this provision, but it has the clear intent and effect given it by the defendant and is necessary for the purpose of taxing all such corporations in accordance with the amount of such stock held by them.

The effect of the plaintiff's contention if followed would require license fees to be assessed on corporations according to their capital or assets, and not be measured by the par or fixed value of their capital stock. But if that rule is applied, then stock without par value must not only be practically eliminated, but the nominal value of par value stock should also be ignored and the actual value of all shares of stock should be ascertained and adopted in all cases as the basis for assessing franchise taxes. When that is done, there will be no difference in fact between franchise taxes and other property taxes and one or the other must be discarded.

The plaintiff complains that the tax assessed against it on the basis fixed by the statute for its stock without par value, would be very burdensome and that it might be more so in some assumed cases. This is a matter entirely within the control of the corporations and if they find that such stock does not have a value for corporation purposes which would justify the payment of a tax on the basis of the valuation fixed by the statute, they may easily relieve themselves from any such burden by reducing

the number of such shares or fixing a par value for such stock in accordance with its issue price or actual value.

The Act may be said to make no classification of corporations according to the kind of stock they may have, but only to require that all stock without par value shall have or be given a valuation in the same amount usually provided for par value stock, for the purpose of computing the franchise tax; but if any classification is made, it is only a division of corporations into those having par value shares and those having shares without par value, which is justified by the nature and uses of such stock. No sub-classification is made of corporations having such stock, and any such assumption is based upon on erroneous conception of the nature of stock without par value and the purposes of a franchise tax computed thereon.

The plaintiff cites several cases in support of the proposition that the provision of this statute for imposing the annual franchise tax upon corporations having stock without par value has no tendency to produce substantial equality among them, but none of the cases in fact sustain the proposition. In the case of *Airway Electric Appliance Corp.* v. *Day*, 266 U. S. 71, the corporation had a large amount of capital stock authorized but not issued, which was included in assessing a franchise tax at the flat rate of five cents per share. Here, all of the authorized capital stock of the plaintiff is issued and outstanding, and the only question is whether the tax shall be computed on its stock without par value at the valu-

ation fixed by the statute or at the price for which it was alleged to be issued.

In the case of *Martin* v. *District of Columbia,* 205 U. S. 135, an assessment was made for widening an alley in the City of Washington under an Act of Congress, in which the basis of assessment on the property benefited was questioned. Likewise, in the case of *Gast Realty & Investment Co.* v. *Schneider Granite Co.,* 240 U. S. 55, 58, the charter and an ordinance of the City of St. Louis which provided for an assessment on property to be benefited by paving a street was under consideration. In the case of *Kansas City Southern Railway* v. *Road Improvement Co.,* 256 U. S. 658, the question was whether railroad property could be assessed on a different basis from other property for the improvement of roads in the District. None of these cases involved any question in regard to corporation franchise fees or taxes and are not in point here.

Under the second point of its brief, the plaintiff cites several additional cases on the subject of the assumed classification of corporations according to the number of authorized non-par value shares they may have for the purpose of determining their annual franchise tax. We have already pointed out that no such classification is made by this statute and none of the cases cited refers to such stock except the *Airway* case, in which the Court considered particularly the inclusion of authorized but

unissued share of stock of a foreign corporation engaged in interstate commerce.

The plaintiff quotes at length from the opinion in *Southern Railway Co.* v. *Greene*, 216 U. S. 412, on the subject of classification. The quotation shows that under the statute of Alabama a large additional franchise tax was imposed upon the railway company as a foreign corporation, while no such tax was imposed upon domestic corporations engaged in the same business and exercising the same privilege. This decision held only that a division between foreign and domestic railroad corporations for the purpose of assessing franchise taxes was not a proper classification. There is no such division or classification under the statute here, but foreign and domestic corporations are placed in the same class and taxed on the same basis.

There is no parallel or relation between that case and the provision or rule applied under the statute involved in the present case. In the *American Uniform Co.* case, in considering a similar provision in the Massachusetts statute, the Court stated that it was not necessary to point out the wide distinction between that case and the case of *Southern Railway Co.* v. *Greene*. It was said that the fact that there is no real similarity between them was apparent from the discussion in *Cheney Bros. Co.* v. *Massachusetts*, 246 U. S. 147, 156. The Court in the latter case showed that the Railway Company in the *Greene* case had acquired permanent property in the State which

it should not be compelled to sacrifice by privilege taxes.

The plaintiff refers again to the *Airway* case, but the statement in regard to the decision in that case, as well as the quotation from the opinion therein, shows that the court was considering the effect of a tax on authorized but unissued capital stock of a corporation engaged chiefly in interstate commerce, and the views stated were with reference to that situation. We will show later that this case is not in point here and should not be applied in any case to the statute in question here.

In the case of *Royster Guano Co.* v. *Virginia,* 253 U. S. 412, the statute imposed a tax upon all of the income of domestic corporations engaged in business in that State and other states, but exempted corporations doing no business within that State. It appeared that this was an unintentional discrimination between domestic corporations which the State had remedied by amendment and the statute was therefore held invalid. This case does not overrule the decision in the case of *Kansas City, M. & B. Railroad Co.* v. *Stiles,* 242 U. S. 111, in which this Court also distinguished the *Greene* case and held that a state may impose a franchise tax equally upon all domestic corporations at a different rate from that imposed upon foreign corporations for the privilege of doing business within the State.

The plaintiff also refers at page 19 of its argument to the case of *Southwestern Bell Telephone Co.* v. *Middlekamp,* 1 Fed. (2nd series) 563, in which it appeared that

a Missouri statute imposed a franchise tax of a percentage of the par value of capital stock and surplus of corporations, but fixed a nominal fee of only $25 upon corporations having no capital stock, which the Court construed to mean stock without par value. This was clearly a discrimination which amounted practically to an exemption of corporations having such stock, without any basis whatever for imposing a tax on such corporations which had any relation to their stock, capital or business. This case affords no authority or reasoning which would be applicable here.

The case of *People* v. *Mensching,* 187 N. Y., 8, 79 N. E., 884, referred to by the plaintiff, was distinguished by the Illinois Supreme Court in the instant case, on the ground that it dealt with a statute which imposed a transfer tax of two cents per share upon all sales of stock with different face values, regardless of the par value of such stock. This case is not in point here, but if sought to be applied to the sale of stock without par value, it would not be in harmony with the opinion rendered by Mr. Justice Holmes in the case of *New York ex rel Hatch* v. *Reardon,* 204 U. S., 152, in construing the prior statute of that state, in which he said:

> "As was pointed out by the Court of Appeals, the familiar stamp tax of two cents on checks, irrespective of amount, the poll tax of a fixed sum, irrespective of income or earning capacity, and many others, illustrate the necessity and practice of sometimes substituting count for weight."

In the case of *People* v. *Walsh*, 195 N. Y. Supp., 194, the statute based a franchise tax upon the capital or assets of corporations employed in that state, and therefore an inferior New York court held that the tax could not be measured by a fixed value upon non par value stock, which might be issued for a very wide range in price. The Illinois Supreme Court also distinguished this case and showed that it had no application to the instant case or statute here under consideration.

The plaintiff also refers to, but does not discuss several other cases on this proposition, but none of them appear to be in point here. In the Kentucky Railroad Tax cases, 115 U. S., 21, the Court held that a statute, which provided for the assessment of railroad property upon a statement of its estimated value, with the right to interested parties to appear and be heard, and to contest the proceeding for the collection of the tax, does not deprive them of their property without due process of law, and that the difference from the mode of valuing other classes of property cannot be considered a denial of the equal protection of the laws under the Fourteenth Amendment.

In *Magoun* v. *Illinois Trust and Savings Bank*, 170 U. S., 283, this Court in sustaining the Illinois Inheritance Tax Law, held that "The state may distinguish, select and classify objects of legislation, and necessarily under such power must have a wide range of discretion." In the case of *Hayes* v. *Missouri*, 120 U. S., 68, with ref-

erence to a statute allowing the state a larger number of peremptory challenges to jurors in cities having over 100,000 inhabitants than in smaller cities in the state, the court quoted from the opinion in *Barbier* v. *Connolly*, 113 U. S., 27, also referred to by the plaintiff, as follows:

> "Class legislation, discriminating against some and favoring others, is prohibited; but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the (14th) Amendment."

III.

The tax provided for by Sections 105 and 107 of the General Corporation Act of Illinois is not a tax upon the capital or assets of a corporation, but is a tax upon the right or privilege granted to the corporation to exist and to transact business in corporate form with a certain fixed amount of capital stock, and this statute has been specifically approved by this court and sustained in principle in many cases.

Hump Hairpin Mfg. Co. v. *Emmerson*, 258 U. S. 290;
Cheney Bros. Co. v. *Massachusetts*, 246 U. S. 147;
Kansas City, M. & B. R. R. Co. v. *Stiles*, 242 U. S. 111;
Kansas City, Ft. Scott & Memphis Ry. Co. v. *Kansas*, 240 U. S. 227;
Baltic Mining Co. v. *Massachusetts*, 231 U. S. 68;
St. Louis S. W. Ry. Co. v *Arkansas*, 235 U. S. 350;

United States Glue Co. v. *Oak Creek,* 247 U. S., 321, 326;
United States Express Co. v. *Minnesota,* 223 U. S. 335, 343;
Flint v. *Stone Tracy Co.,* 220 U. S. 107;
Wis. & Mich. Ry. Co. v. *Powers,* 191 U. S., 379;
Maine v. *Grand Trunk Ry. Co.,* 142 U. S. 217;
Postal Tel. Cable Co. v. *Adams,* 155, U. S. 688.
Philadelphia S. S. Co. v. *Pennsylvania,* 122 U. S. 326;

Under the third proposition in its brief, the plaintiff complains of the use of the authorized capital stock of a corporation in measuring the annual franchise tax to be imposed upon it, although part of such stock has not been issued. The plaintiff, however, is not in any position to raise this question, as its bill of complaint shows that all of its authorized stock is issued and outstanding, and no such question was raised or presented by its bill and the demurrer thereto (R. 1-9). Although that question is not presented and cannot be determined by the Court in this case, we will answer briefly the argument presented by the plaintiff on this point.

The plaintiff at the outset suggests various reasons why it is necessary or desirable for a corporation to have authorized capital stock which may not be issued at once, but contends that such stock should not be considered in imposing a franchise fee or tax. The argument and illustrations set forth indicate that the plaintiff really contends that the tax should be based upon the capital or as-

sets of the corporation, instead of being measured by either the authorized or issued capital stock.

The only authority discussed here by the plaintiff is the case of *Airway Electric Appliance Corp.* v. *Day, supra.* That was a foreign corporation engaged in interstate commerce, on which the State of Ohio sought to impose a tax based chiefly on a large amount of stock which had been authorized by the State of Delaware, but which had not been issued. The Court showed that the State of Ohio had nothing to do with such unissued stock and the language quoted by the plaintiff clearly shows that it applied only to foreign corporations and should be limited to the statute and conditions there involved.

In the instant case, the proposition presented is the application of the Illinois statute to a domestic corporation, which has issued all of its capital stock and which is engaged only in intrastate business. The situation here is entirely different from that presented in the *Airway* case, and therefore the decision in that case has no proper application. There is no element here of authorized stock unissued, or of the State having no control over such stock, or of taxing property beyond the State, or of imposing a burden upon interstate commerce or discriminating against the plaintiff in any manner whatsoever with respect to any such matters.

The plaintiff has evidently misconceived the nature of the excise or license fee imposed by our statute, and as-

sumes that it should be measured by capital or assets, which would make it similar to a property tax. The nature of this tax was clearly stated by this Court in the case of *Kansas City, Ft. Scott and Memphis Ry. Co.* v. *Kansas*, 240 U. S. 227. In that case, the state imposed an annual tax graduated on the amount of capital stock of a domestic corporation. In considering the nature of such a tax this Court in an opinion rendered by Mr. Justice Hughes, quoted from the opinion of the Kansas Supreme Court as follows:

> "The fee collected is a tax upon the right of corporate existence—the franchise granted by the state to be a corporation—to do business with the advantages associated with that form of organization."

In approving the statement quoted, this Court further said in its opinion in that case:

> "And agreeably to the principle above mentioned, it has never been and cannot be maintained that an annual tax upon this privilege is in itself and in all cases, repugnant to the Federal power, *merely because it is measured by the authorized or paid up capital stock.* The selected measure may may appear to be simply a matter of convenience in computation and may furnish no basis whatever for the conclusion that the effort is made to reach subjects withdrawn from the taxing authority."

The Court also referred in that case to its decision in *Baltic Mining Co.* v. *Massachusetts*, 231 U. S. 68, where a tax was imposed on the entire capital stock of foreign corporations, but was limited to a maximum amount of

$2,000 and stated: "The authorized capital stock is only used as the measure of a tax, in itself lawful, without the necessary affect of burdening interstate commerce," and hence the legislation was within the authority of the state.

The case here presented is controlled in principle by the decision of this Court in *Kansas City, M. & B. R. R. Co.* v. *Stiles,* 242 U. S. 111. In that case, the railroad company was a consolidated corporation which was incorporated in Alabama and two other states. The Alabama statute imposed on the consolidated company as a domestic corporation a tax graded according to its entire capital stock, although more than half of it represented business in other states, while foreign corporations were taxed only on capital stock representing business within the state. After referring to its previous decision in the case of *Southern Railway Co.* v. *Greene, supra,* the Court said:

> "That case is readily distinguishable from the one now under consideration. Here the state imposes the franchise tax equally upon all of its corporations, consolidated and otherwise. The fact that a wholly intrastate corporation may own no property outside of the state, while the consolidated company does, presents no case of arbitrary classification. In both cases, the franchise tax is based upon a percentage of the capital stock. There is no denial of equal protection of the laws because a state may impose a different rate of taxation upon a foreign corporation for the privilege of doing business within the state than it applies to its own corporations upon the franchise which the state grants in creating them."

It was urged in that case that the statute imposing the tax was void because it violated the equal protection clause of the 14th Amendment, and taxed property beyond the jurisdiction of the State and also imposed a direct burden on interstate commerce. In considering these questions, the Court referred to the case of *Kansas City, Ft. Scott & Memphis Ry. Co.* v. *Kansas*, 240 U. S. 227, and said at page 118:

> "In that case, after a full review of the previous decisions in this Court, it was held that each case must depend upon its own circumstances, and that while the state could not tax property beyond its borders, it might measure a tax within its authority by capital stock which in part represented property without the taxing power of the state. As to the objection based upon the due process clause of the Constitution, we think that principle controlling here. There is no attempt in this case to levy a property tax; a franchise tax within the authority of the state is in fact measured by the capital stock representing property owned in other states."

This Court has specifically upheld the statute of this State in the case of *Hump Hairpin Mfg. Co.* v. *Emmerson*, 258 U. S. 290; 66 L. Ed. 622. That was a foreign corporation which was engaged largely in interstate commerce. The tax was imposed on all of its authorized captial stock, although part of it had not been issued, and it was urged that this constituted a burden on interstate commerce. After discussing the principles applicable in such cases, as shown by the authorities citied, the Court said, at page 295:

"No formula has yet been devised by which it can be determined in all cases whether or not such a tax is valid, and applying the repeated declaration of this Court, in the cases cited and in many others, that the question is inherently a practical one, depending for its decision on the special facts of each case, we are clear that the tax here involved falls within the excepted class described, even though business done with residents of states other than Illinois be regarded as interstate."

"Clearly the Statute is not a disguised attempt to tax interstate commerce. On the contrary, its purpose plainly is to differentiate state from interstate business and to impose the tax only on the former. Construed with other statutes, the act accords equal treatment to domestic and foreign corporations, and clearly in this case property of the company beyond the jurisdiction of the State is not taxed—all of its property is in Illinois. To require foreign corporations to pay for the privilege of doing business in a state is, of course, a familiar and often approved form of taxation, and in this case the fee imposed is reasonable in amount."

The Court further stated in that case that the tax was not imposed or computed upon the proceeds of interstate business, but that such business was only one of three factors used in estimating or measuring "the amount of capital stock represented by property and business transacted in Illinois," upon which the tax was computed, the other two factors being the property located and business transacted in Illinois. The Court said that if this tax had been imposed upon such a corporation without reference to the basis of computation, or as an in-

come tax, no valid objection could have been made to it, and the judgment of the Supreme Court of Illinois was therefore affirmed.

This Court in the opinion in the *Airway* case does not mention any of the cases from which we have quoted above and clearly did not intend to overrule them or the principles upheld by them. It is apparent that the decision in the *Airway* case was due to the fact that the State sought to impose an excessive tax on a foreign corporation in such manner as to seriously burden its interstate commerce and constitute in effect a tax on property outside the State. As stated by the Court in the *Hump* case and many other cases, the question there presented was inherently a practical one, depending for its decision on the special facts of each case, and there was no intention or purpose of adopting a new rule or principle contrary to that followed in the cases above cited.

This view is sustained by the fact that the decision in the *Airway* case was based mainly upon the case of *International Paper Co.* v. *Massachusetts,* 246 U. S. 135. That case involved the Massachusetts statute, after the maximum limit had been removed by amendment, which caused the tax to be based upon the entire authorized capital stock of foreign corporations engaged in interstate commerce, with comparatively a small amount of property and business in that State.

That case in turn followed the previous decisions of the Court in the similar cases of *Western Union Tel. Co.* v. *Kansas,* 216 U. S. 1, *Pullman Co.* v. *Kansas,* 216 U. S. 56, and *Ludwig* v. *Western Union Tel. Co.*. 216 U. S. 146, which involved a similar statute of the State of Kansas. These cases were followed in the later case of *Looney* v. *Crane Co.,* 245 U. S. 178, involving a similar Texas statute. In the latter case, the Court distinguished these cases from those above cited by us, which it held followed the rule laid down in *Postal Tel. Cable Co.* v. *Adams,* 155 U. S. 688, 698, that "the substance and not the shadow determines the validity of the exercise of the power."

The case of *Cheney Bros. Co.* v. *Massachusetts,* 246 U. S. 147, which included seven consolidated cases involving the Massachusetts statute, was heard and decided at the same time as the *International Paper Co.* case, the opinion in each case being rendered by Mr. Justice VanDevanter. The opinion in the *Cheney Bros.* case states that the tax was imposed before the maximum limit was removed by the amendment, and that in that respect the case was like the *Baltic Mining Co.*, case and unlike the *International Paper Co.* case, which arose after the amendment removed the maximum limit. The Court also said, at page 157:

> "A State may impose a different rate of taxation upon a foreign corporation for the privilege of doing business within the State than it applies to its own corporations upon the franchise which the State grants in creating them." Citing: *Kansas*

City, Memphis & Birmingham R. R. Co. v. *Stiles*, 242 U. S. 111, 118."

The fact that the *Airway* case and the other cases upon which it is based are not applicable to the instant case, is further indicated by the opinion of this Court in the *Stiles* case, last cited, in which the Court, after discussing the facts in that case, stated at page 119:

> "The tax is not of the character condemned in *Western Union Tel. Co.* v. *Kansas*, 216 U. S. 1, and kindred cases. In the latter case, a tax of large amount was imposed upon a foreign corporation engaged in interstate commerce for the privilege of doing a local business within the State. Under the circumstances therein disclosed, this Court held that the statute was in substance an attempt to tax the right to do interstate business, and to tax property beyond the confines of the state, and was therefore void. Here a franchise tax is levied upon a corporation consolidated under the laws of the State by its own acceptance of that law in incorporating under it."

Many other cases might be cited which sustain the principle that the use of the amount of authorized capital stock of a corporation as one of the factors or elements in determining the amount upon which an excise or license tax may be based, does not deny the equal protection of the laws, or necessarily impose any burden or restraint upon interstate commerce. Some other decisions of this Court bearing on this question are cited under the heading on this point, but any further discussion of this principle is not deemed necessary, inasmuch as the question

is not presented by the bill of complaint or facts in this case.

The plaintiff concedes that the right or privilege of having a certain amount of capital stock authorized which may be issued from time to time as desired, is a valuable right or privilege to the corporation, even though all of the stock may not be issued at once. The State which has granted that authority or privilege should have the right to measure the value of a franchise granted by it to the corporation upon such stock with the power to issue and use it in carrying on its corporate business. The State has given full authority for that purpose and in this case the corporation has exercised the authority and privilege granted to it, by issuing all of its stock and certainly is in no position to complain after so doing.

The plaintiff concludes its argument on this subject by suggesting that a license fee or franchise tax should be based on the paid in capital stock and possibly the surplus of a corporation, without regard to the kind or amount of stock authorized or the uses which may be made of it. There is hardly any more relation between the property and business of a corporation and the price of its issued capital stock than there is with the authorized capital stock. If actual value alone is to control, then the tax should be based on the property used and business transacted in the state and not be measured by either the par value or issue price of such stock.

The fundamental defect in the plaintiff's argument is that it conceives the license fee or franchise tax to be in effect a tax on the capital or assets of a corporation; whereas, it is an excise or franchise tax, which is imposed for the right and privilege granted by the State to the corporation to exist and carry on business as a corporation with a certain amount of capital stock. Such excise or tax may as well be measured by the capital stock which the State has authorized such corporation to have and use, as by the amount of stock which the corporation may have actually issued for such purposes. In any event, when the corporation accepts from the State its charter or authority to organize and carry on business as a corporation, it agrees to accept the terms and conditions imposed by the State for the privileges granted by it, and cannot afterwards repudiate its agreement.

IV.

The Amendment of May 3, 1923, to Section 105 of the Illinois Corporation Act was within the Power Reserved by the State and the Decision of the Illinois Supreme Court thereon did not Impair any Constitutional Right of the Plaintiff in Error under its Charter.

Smith-Hurd's Ill., Rev. Stats., 1925, Chap. 32, Sec. 146;
Holyoke Water Power Co., v. *Lyman*, 15 Wall. 500;
Greenwood v. *Union Freight R. R. Co.*, 105 U. S. 13;
Looker v. *Maynard*, 179 U. S. 46;
Polk v. *Mutual Reserve Fund*, 207 U. S. 310;

Wright v. *Minn. Mutual Life Ins. Co.*, 193 U. S. 657;
Spring Valley Water Wks. v. *Schottler*, 110 U. S. 347;
Close v. *Glenwood Cemetery*, 107 U. S. 466;
Hoge v. *Richmond Etc. Ry. Co.*, 99 U. S. 348;
Shields v. *Ohio*, 95 W. S. 319.

Prior to the passage of the General Corporation Act of 1919, there was no provision in the Illinois Law for any corporation to have capital stock without par value. This Act authorized or permitted corporations to have such stock and Section 96 fixed the initial or organization fee on the amount of capital stock which domestic corporations were authorized to have and provided that if its shares had no par value, they should be considered to be of the par value of $100 per share. Section 101 contained a similar provison with respect to the capital stock of foreign corporations represented by their property and business in that State.

Section 105 of this Act provided that all such corporations should pay an annual license fee or franchise tax, measured by the proportion of their authorized capital stock represented by business transacted and property located in the State, but that in no event the amount of such tax should be less than that required of corporations having no tangible property or business in the State, as provided by Section 107 of the Act. The latter section also provided that if the corporation had stock of no par value, its shares, for the purpose of fixing such fee, should be considered to be of the par value of $100 per

share, but that specific provision was omitted from Section 105, as originally passed.

After the plaintiff had amended its charter in June, 1921, by providing for 10,000 shares of additional stock without par value, and had paid the initial tax thereon under said Section 96, the Secretary of State assessed its annual tax under Section 105 of the Act in the same manner. Inasmuch as that Section did not then contain the specific valuation provision of stock without par value, plaintiff contended that it could only be assessed the minimum fee on that basis under Section 107 of the Act. The Supreme Court of Illinois sustained this contention and so held, on the sole ground that by reason of the omission of this provision in Section 105, it could not be applied to the plaintiff's stock without par value under that Section (305 Ill., 348).

By reason of that decision, the Illinois Legislature, on May 3, 1923, amended said Section 105 by adding thereto the specific provision for the valuation of stock without par value, for the purpose of assessing the annual license fee or tax, as previously contained in other sections of the Act. The amendment specifically stated that at the time this Act was passed, by which the State conferred upon corporations the privilege of having shares without par value, it was the intent of the Legislature, as a prerequisite to the right of corporations to enjoy such privilege, that in all cases they should pay the same amount of franchise taxes as on shares of the par

value of $100 each, and to carry out that purpose, it was provided that the amendment should take effect at once (R. 4).

Pursuant to this provision, the Secretary of State assessed the plaintiff's annual franchise tax for the year commencing July 1, 1923, and the plaintiff thereupon filed this suit to enjoin the collection of the tax assessed on that basis. The plaintiff's bill does not allege that this amendment impaired the validity of its charter and it therefore appears that no such question was presented in the lower court and that it cannot be properly raised on the appeal or writ of error herein.

The plaintiff refers to the language previously used by the Illinois Supreme Court in defining or considering capital stock. That Court referred to such statements upon the appeal in this case, and stated that they were correct with respect to corporations having only par value stock, but that under the Act of 1919, the amount of no par value stock is not required to be fixed in money in the articles of incorporation, but may be left to the later determination of the directors (R. 50; 313 Ill., 137, 145).

The only question presented to the Court in the first suit brought by the plaintiff and reported in 305 Ill., 348, was whether its stock without par value could be assessed on the basis of $100 per share, in the absence of any such provision at that time in Section 105 of the Act. In determining that question, it was not necessary for that

Court to define or discuss the meaning of capital stock, as quoted by plaintiff at page 30 of its brief, but only to determine whether the specific valuation should be given stock without par value, in the absence of any such provision at that time in Section 105 of the Act.

Even if it had been necessary to define the meaning of capital stock in determining the question presented in that case, the Court would not be bound by such interpretation. The plaintiff had already added and issued its stock without par value under its amendment in June, 1921, and made no change in its position after the subsequent decision of the Court in that case on October 21, 1922. No right or interest was afterwards acquired by it in reliance on such decision, and consequently, it cannot complain that any such right was violated by any change in the view of the Court in regard to its capital stock in the last decision in this case.

The plaintiff refers at the bottom of page 31 of its brief to the decision of this Court in the *Muhlker* case, but it clearly appears in that case that after the New York courts had decided the prior cases, Muhlker acquired his property in reliance on the doctrine set forth in such cases. By reason of that fact, this Court held that the state courts could not thereafter modify their decisions in such manner as to destroy or impair the rights which he had acquired in reliance on the former

decisions. The situation in that case was therefore wholly unlike the position of the plaintiff in the instant case.

The plaintiff complains also that the legislature impaired the obligation of its charter by enacting the amendment of May 3, 1923, which fixed a specific valuation on shares of stock without par value, for the purpose of assessing annual franchise taxes in accordance with the intention of the Legislature. It appears to be the view of the plaintiff that after granting to it a charter under which its annual franchise tax should be assessed as held by the Court in 305 Ill., 348, the State could not afterwards amend the Act under which the charter was granted in such manner as to change the basis or measure of the assessment in any respect.

This view ignores the general rule that a State has the implied power not only to enact new laws, but to amend and modify existing laws providing methods for imposing taxes and regulating the affairs of persons and corporations within its jurisdiction, as a matter of public policy. In the case of *Cheney Bros. Co.* v. *Massachusetts*, 242 U. S. 147, where this same question was raised with respect to a foreign corporation, this Court said, at page 157:

> "A state does not surrender or abridge its power to change or revise its taxing system and tax rates

by merely licensing or permitting a foreign corporation to engage in local business and acquire property within its limits."

Moreover, the State of Illinois in its General Corporation Act, specifically reserved the right and power to prescribe such additional regulations, provisions and limitations as it may deem advisable with respect to all domestic and foreign corporations under that Act and to amend, repeal or modify the Act in any manner it may desire. This reservation is contained in Section 146 of the Act, which reads as follows:

> "Section 146. The General Assembly shall at all times have power to prescribe such regulations, provisions and limitations as it may deem advisable, which regulations, provisions and limitations shall be binding upon any and all corporations, domestic or foreign, formed or admitted to do business under this Act, and subject thereto, *and the Legislature shall have power to amend, repeal or modify this Act at pleasure.*"

This Court has frequenty held that the legislative power to alter, amend or repeal charters is equally effectual, whether it be reserved in the original act of a corporation, the articles of association under a general law, or in the coustitution of the state in force when the incorporation under a general law is made. In many of the states, the power to amend, alter or repeal the charters of corporations is reserved by general statute, as in this

case. Such a provision has precisely the same effect as to all charters granted under the statute, as if the reservation were expressly inserted in each charter (See cases cited under Point IV, supra).

Under this Section, the legislature clearly had the right and power to make any change it saw fit in the basis or measure of the annual tax to be assessed against corporations, even though such provision had not been previously contemplated or intended to be made and the power to do so had not existed under the general rule of law. Consequently, there is no ground for the complaint made by the plaintiff that either this amendment or the prior decision of the State Supreme Court impaired the validity of its charter contract, even if that question had been presented by its bill of complaint and urged in the lower Court.

As pointed out in the statement preceding this brief and argument, the only question presented to this Court by the bill of complaint is whether the specific valuation provision added to Section 105 by the amendment of May 3, 1923, and the similar provision at the end of Section 107, violates the equal protection clause of the Fourteenth Amendment to the Federal Constitution. No prior decision of the State Court has any bearing on the proper determination of that question.

The specific question here presented is whether a state may impose an annual license fee or franchise tax on a domestic corporation, measured in part by a specific valuation of its stock without par value, which is fixed at the same amount usually provided for par value stock, having in view the nature and uses of such respective kinds of stock and the fact that this is an excise or franchise tax on corporations, and not in any sense a tax on their capital or assets according to value. The state undoubtedly has the right to determine the amount and kind of stock a corporation created by it may have, and whether it may have authorized stock which may be issued from time as desired. Having granted the privileges requested by the corporation and fixed the measure of value for the privileges granted in such cases, the state leaves to the corporation the issue and sale of its stock and the management of its property and business in such manner as it shall deem best. The corporation should not blame the state or its court for any difficulty it may have in providing for its stock and adjusting its affairs to best meet the terms provided by the state for all corporations on the same basis.

The state in this case is under no compulsion or necessity in reason or authority to make the changes and adopt the methods suggested by the plaintiff for assessing franchise taxes on corporations. The defendant is aware that objections have been and will be made to any

system of franchise taxes which may be devised, and that any method will sometimes produce difficulties and even hardships in special cases, under the endless variety of conditions which may arise. The state here has adopted a method or system which is capable of being readily applied and enforced and has been generally adopted in other states as fair and equitable to corporations subject to its provisions. Each corporation is in a position to adopt and apply such provisions in the manner best suited to its situation and needs and should make such arrangements or adjustments as may be necessary for that purpose.

While this case directly involves only the provision for assessing the tax with respect to stock without par value, other provisions and sections of the Act are closely related or associated with it. An adverse view of this provision might seriously affect or impair other provisions of the Act, and cause a very material loss and injury to the State in the amount of revenue it is entitled to receive from corporations organized or admitted into the state, before the defect could be repaired. The provisions of this Act have been very carefully considered and approved by the State Supreme Court, and the principal provisions of the Act have also been approved by this Court in the *Hump Hairpin* case and other similar cases. It is therefore respectfully urged that this Court

should approve the decision and judgment of the Supreme Court of Illinois in this case, and thereby sustain the specific provision for measuring franchise taxes on corporations having stock without par value, which has been adopted by this State and many other states in dealing with this subject.

All of which is respectfully submitted.

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APPENDIX.

Relevant Sections of the General Corporation Act of Illinois.

Section 96. The Secretary of State shall charge and collect an initial fee of one-twentieth of one per centum upon the amount of the capital stock which the corporation is authorized to have, but in no case shall such fee be less than twenty dollars, and a like fee upon any subsequent increase and in addition thereto the same fee as that required for filing other certificates of amendment. In the event that the corporation has capital stock of no par value, its shares, for the purpose of fixing the fee, shall be considered to be of the par value of one hundred dollars per share. Each public utility corporation shall pay to the Secretary of State the same fees as are required to be paid for incorporation by other corporations organized for pecuniary profit.

Section 105. Each corporation for profit, including railroads, except insurance companies, heretofore or hereafter organized under the laws of this State or admitted to do business in this State, and required by this Act to make an annual report, shall pay an annual license fee or franchise tax to the Secretary of State of five cents on each one hundred dollars of the proportion of its capital stock authorized by its charter in the office of the Secretary of State, represented by business transacted and

property located in this State, but in no event shall the amount of such license fee or franchise tax be less than that required by this Act of corporations having no tangible property or business in this State. In the event that the corporation has stock of no par value, its shares, for the purpose of fixing such fee, shall be considered to be the par value of $100 per share. (As amended by act approved May 3, 1923. L. 1923, p. 280).

Section 107. In case it appears from the annual report that the corporation has no tangible property located in the State, and is transacting no business in this State, the following fees shall be paid annually to the Secretary of State as an annual franchise tax: All such corporations having a capital stock of $50,000 or less shall pay an annual fee of $10; corporations having a capital stock of more than $50,000 but not exceeding $200,000 shall pay an annual fee of $15; corporations having a capital stock of more than $200,000 but not exceeding $500,000 shall pay an annual fee of $20; corporations having a capital stock of more than $500,000 but not exceeding $1,000,000 shall pay a fee of $50; corporations having a capital stock of more than $1,000,000 but not exceeding $10,000,000 shall pay a fee of $200; and all corporations having a capital stock in excess of $10,000,000 shall pay an annual fee of $1,000.

In the event that the corporation has stock of no par value, its shares, for the purpose of fixing such fee, shall be considered to be of par value of $100 per share.

Section 146. The General Assembly shall at all times have power to prescribe such regulations, provisions and limitations as it may deem advisable, which regulations, provisions and limitations shall be binding upon any and all corporations, domestic or foreign, formed or admitted to do business under this Act, and subject thereto, and the Legislature shall have power to amend, repeal or modify this Act at pleasure.

SUPREME COURT OF THE UNITED STATES.

No. 210.—October Term, 1925.

Roberts & Schaefer Company, Plaintiff in Error, *vs.* Louis L. Emmerson, as Secretary of State for the State of Illinois.	On Writ of Error to the Supreme Court of the State of Illinois.

[April 12, 1926.]

Mr. Justice Stone delivered the opinion of the Court.

The plaintiff in error, a corporation organized under the laws of Illinois, and doing business in that State, filed its bill in the circuit Court of Sangamon county, Illinois, for a mandatory injunction to compel the defendant in error, as Secretary of State for Illinois, to accept the sum of $75.00 in full discharge of its liability for an annual franchise tax for the year 1923, imposed by § 105 of the Illinois Corporation Act, and to enjoin the defendant in error from collecting more than that amount.

The plaintiff corporation was originally organized with an authorized capital stock of $100,000, divided into one thousand shares of the par value of $100. In 1921, the Illinois Corporation Act was amended so as to allow corporations to issue shares of no par value. Ill. Rev. Stats., (Cahill, 1925) c. 32, § 32, as amended by Act of June 11, 1921, Laws 1921, p. 365. Shortly after the passage of this Act, the corporation, by amendment of its charter, converted its outstanding stock into preferred stock, and authorized and issued forthwith, 10,000 shares of common stock of no par value.

Section 105 of the Corporation Act then provided:

"Each corporation for profit . . . organized under the laws of this State or admitted to do business in this State, and required by this Act to make an annual report, shall pay an annual license fee or franchise tax to the Secretary of State of five cents on each one hundred dollars of the proportion of its capital stock, author-

ized by its charter in the office of the Secretary of State, represented by business transacted and property located in this State. . . ."

The Secretary of State demanded of the plaintiff corporation, under this statute, the payment of five cents on each share of no-par stock, on the assumption that for the purpose of the tax, no-par shares were to be valued at $100. The plaintiff took the position that there was no statutory authority for the assessment of the tax on that basis, and that since its no-par value shares had been issued as "fully paid up and non-assessable upon the payment of five dollars for each share in cash or property", it was liable to a tax only on the basis of that valuation; and tendered the tax so computed to the Secretary of State. In a mandamus proceeding brought by the plaintiff corporation, the Supreme Court of Illinois upheld this contention and ordered the Secretary of State to accept the lesser sum in satisfaction of the tax. *People ex rel. Roberts & Schaefer Co.* v. *Emmerson*, 305 Ill. 348.

After this decision, the legislature of Illinois amended § 105 (Laws 1923, p. 280) by adding the sentence:

"In the event that the corporation has stock of no par value, its shares, for the purpose of fixing such fee, shall be considered to be of the par value of $100 per share."

The plaintiff's bill in the case before us attacks the validity of the franchise tax imposed on it pursuant to this amendment, on the ground that the amendment is unconstitutional. The circuit court dismissed the bill for want of equity. On appeal, the Supreme Court of Illinois affirmed the judgment (313 Ill. 137), holding that the tax was lawfully assessed. The plaintiff comes here on writ of error. Jud. Code § 237.

It is urged that the selection of authorized capital stock as the basis for the franchise tax or license fee is arbitrary and has no tendency to produce equality, and results in imposing different rates of taxation on corporations having the same issued capital stock, holding the same amount of property and doing the same amount of business, whenever they have different amounts of authorized capital stock; that the mere number of authorized no-par value shares regardless of their value or the amount of money or property for which they are or may be issued, is not a reasonable basis for a franchise tax, but is wholly arbitrary; that the provision of § 105 assigning an arbitrary valuation of $100

per share to no-par stock for the purpose of computing the tax in question, results in a discrimination against corporations which issue shares of no par value, and in favor of those which issue them at a par value. Reliance is also placed on the invalidity of the amendment as impairing the obligation of contract (Constitution, Art. 1, § 10) in that the shares of the plaintiff were issued before the amendment of § 105, and at a time when, it is alleged, the law of Illinois provided that, for the purpose of this tax, no-par stock was to be valued at the amount for which it was actually issued.

In support of the argument that authorized capital stock is not a permissible basis for a franchise tax, the plaintiff relies on *Air-Way Electric Appliance Corp.* v. *Day*, 266 U. S. 71. That case dealt with a privilege tax, laid by Ohio on a foreign corporation engaged in interstate and intrastate commerce in that and other States. It was held that a tax on such a corporation for the privilege of doing business in Ohio, where the tax was measured by that proportion of its total authorized capital stock which its business done and property owned in Ohio bore to its total business done and property owned everywhere, was invalid as an unconstitutional burden on interstate commerce, and a denial of the equal protection of the laws. While one factor in the computation of the tax was properly the proportion of the corporation's business done and property owned within the State, the other factor was the amount of its authorized capital stock, only a part of which had actually been issued. The authority to issue its capital stock was a privilege conferred by another State and bore no relation to any franchise granted to it by the State of Ohio or to its business and property within that State. When authorized capital stock is taken as the basis of the tax, variations in the amount of the tax are obtained, according as the corporation has a large or small amount of unissued capital stock. This we held, in the *Air-Way* case, to be an unconstitutional discrimination, since it resulted in a tax larger than the tax imposed on other corporations with like privileges and like business and property within the State, but with a smaller capital authorized under the laws of the State of their creation.

In the present case, the plaintiff corporation is organized and does all its business in Illinois. We cannot say that a State may

not impose a franchise tax on a domestic corporation, measured by its authorized capital stock. See *Kansas City Ry.* v. *Kansas*, 240 U. S. 227, 232-3; *Kansas City* v. *Stiles*, 242 U. S. 111.

But the plaintiff is not in a position to raise this question. As this Court has often held, one who challenges the validity of state taxation on the ground that it violates the equal protection clause, cannot rely on theoretical inequalities, or such as do not affect him, but must show that he is himself affected unfavorably by the discrimination of which he complains. See *Western Union Tel. Co.* v. *Massachusetts*, 125 U. S. 530, 552-3; *Gast Realty Co.* v. *Schneider Granite Co.*, 240 U. S. 55, 60; *Withnell* v. *Ruecking Constr. Co.*, 249 U. S. 63; *Underwood Typewriter Co.* v. *Chamberlain*, 254 U. S. 113, 121. The plaintiff cannot complain that the tax is measured by authorized, instead of issued, capital stock, because all of its authorized capital stock has been issued. Any discrimination that exists operates, therefore, in plaintiff's favor.

It is argued that the tax imposed is a tax at a flat rate per share on no-par value stock, regardless of its value, so that different corporations are taxed at different amounts although their no-par stock was issued for the same total amount of capital; and that the tax is based upon an unreasonable and discriminatory classification in which no-par value stock is placed in one class and taxed at an arbitrary valuation of $100 per share, while par value stock is placed in another class and taxed at the value at which it is authorized to be issued. Both arguments leave out of account the nature of the tax and the essential differences between the two classes of stock.

The tax is imposed as a franchise tax upon a domestic corporation doing business only within the State. Its power to issue shares of both classes is derived from the laws of Illinois. The amount which may be issued; the manner of issue; the liability of holders of these shares and all other incidents of them, are regulated by the law of that State. The tax is not a property tax imposed on shares of stock or on the assets of the corporation. It is a tax on the corporate franchise, which includes the privilege, whether exercised or not, of issuing and using when issued, a particular kind of stock known as "no-par value stock". As the stock may, under the statute, be issued for as much as $100 a share, if the company so chooses, the statute fixes the maximum

extent to which the privilege may be exercised as the basis for computing the tax.

Neither this privilege nor the corresponding privilege of issuing par value stock bears any necessary relation to the value of the stock or the assets of the corporation; and the tax is imposed whether or not the stock is issued and without regard to the value of the stock or of the corporate property. We cannot say that the value of the corporation's franchise may not be measured by the number of no-par shares which may be issued rather than their value when issued. The only question with which we need be concerned is whether there are such differences between the two privileges to issue the two classes of stock, as to constitute a proper basis for classification for purposes of taxation, so that the amount of the tax in the one case may be based on the issue price of the stock, and in the other upon the maximum price at which it may be issued, regardless of the price at which it actually is issued.

That there are differences of practical importance between the two classes of stock and the privileges of issuing and using them is sufficiently evidenced by the very general adoption of legislation authorizing the issue of no-par value stock, and by the widespread practice of issuing that type of corporate shares.

The nature of the more important of these differences sufficiently appears from the provisions of the Illinois statute as interpreted and applied in the opinion below in the Supreme Court of Illinois. Par value stock may be issued only for money or property equivalent to the par value. No-par value stock may be issued for money or property of any amount or value provided it is not less than $5.00 nor more than $100 per share. From this it follows that all the par value stock of an authorized class must be issued, if issued at all, at a uniform value or price, while no-par value stock may be issued from time to time at different prices or values, although the holders of all these shares are entitled to share equally in the distribution of profits of the corporation. The liability of stockholders of the two classes of stock for the debts of the corporation may be different, and greater facility is permitted in the issuance and marketing of no-par value shares than in the case of stock having a par value.

These differences, both in the legal incidents and in the practical uses of the two classes of stock, not only are a basis for classifica-

tion of them for purposes of taxation, but make unavoidable certain differences in the method of assessing this tax. Authorized capital stock cannot well be used as the measure of a tax unless some arbitrary value is assigned to the no-par shares; for they may be issued from time to time at varying prices, and until issued, they cannot have any value. To require the stock to be issued at a value fixed in advance of its issue, and to make that value the basis of the tax, would in effect abolish no-par stock. Because of the essential differences between the two kinds of stock, it is difficult to conceive of any other method of assessing the tax which would save the character of no-par value stock and not result in similar inequalities.

The inequalities complained of result from a classification which, being founded upon real differences, is not unreasonable, and the discrimination which results from it is not arbitrary or prohibited by the Fourteenth Amendment. It is enough that the classification is reasonably founded upon or related to some permissible policy of taxation. *Watson* v. *State Comptroller*, 254 U. S. 122; *Pacific Express Co.* v. *Seibert*, 142 U. S. 339; *American Sugar Refining Co.* v. *Louisiana*, 179 U. S. 89; *Clement National Bank* v. *Vermont*, 231 U. S. 120, 135-7.

Only brief consideration need be given to the contention that the amendment of § 105 of the Illinois Corporation Act impairs the obligation of contract. That plaintiff's stock when issued was not subject to the tax computed at the rate of $100 per share, which was later authorized by § 105 as amended, was decided in *Roberts & Schaefer Co.* v. *Emmerson*, 305 Ill. 348. The fact that the corporation issued its stock under statutes which were later so interpreted can give rise to no inference that the State contracted not to increase or otherwise modify the tax. See *Home Ins. Co.* v. *City Council*, 93 U. S. 116; *Memphis Gas Co.* v. *Shelby County*, 109 U. S. 398; *Wisconsin & Michigan Ry.* v. *Powers*, 191 U. S. 379; *Seaton Hall College* v. *South Orange*, 242 U. S. 100.

Even if the taxing statute be deemed to be a part of its corporate charter, it was nevertheless subject to the provisions of § 146 of the Illinois General Corporation Act reserving to the legislature the power "to amend, repeal or modify this act at pleasure."

Judgment of the Supreme Court of Illinois is

Affirmed.